United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

105

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,330

UNITED STATES OF AMERICA,

Appellee

v.

MALVIN G. SHEFFIELD, JR.,

Appellant

On Appeal From A Judgment Of The United States District Court For The District Of Columbia

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ISSUES PRESENTED

In the opinion of the appellant, the following issues are presented:

1. Was appellant denied effective representation of counsel because his trial counsel proceeded with the pre-trial hearing on the admissibility of out-of-court eyewitness identifications and with the trial itself without obtaining and evaluating the transcript of the preliminary hearing where:

A. Failure to obtain and evaluate the transcript deprived defendant of the opportunity at the pre-trial suppression hearing to challenge the opportunity of the eyewitnesses to observe him, the propriety of the lineup, and the qualifications of the witnesses to testify at the trial itself; and,

B. Failure to obtain and evaluate the transcript deprived defendant of the opportunity to impeach the credibility of the two eyewitnesses (whose identification testimony was the only evidence linking defendant to the holdup) on several key issues at the trial.

2. Was appellant denied a fair trial by the refusal of the judge to instruct the jury that evidence which seriously undermined the separate alibi of the

co-defendant should not be considered in determining the guilt or innocence of Mr. Sheffield, where

A. The Government sought to show that the two were acquainted and had acted together in the holdup;

B. The Government sought in its closing argument to attack defendant's alibi by linking it to co-defendant's discredited alibi; and,

C. Where the validity of Mr. Sheffield's alibi and the credibility of the witnesses was the crucial issue in the case at trial.

This case was before the Court earlier as United States v. Malvin G. Sheffield, Jr., No. 23,143. The defendant there appealed his pre-trial detention, pursuant to 18 U.S.C. § 3147(b). The appeal was dismissed by this Court sua sponte when the defendant obtained his pre-trial release.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,330

UNITED STATES OF AMERICA

v.

MALVIN G. SHEFFIELD, JR.,

Appellant.

On Appeal from a Verdict and Judgment of the
United States District Court for the District of Columbia

BRIEF FOR APPELLANT

REFERENCES TO RULINGS

Rulings at the Pre-Trial Suppression Hearing

Reference is made in the brief to the trial court's rulings at the pre-trial hearing regarding the admission of out-of-court identification evidence. These rulings are reported at pages 45-46 of the transcript of the pre-trial hearing (March 23, 1970).

Rulings at the Trial

Reference is made in the brief to the trial court's rulings denying defendant's request for a limiting instruction cautioning the jury that evidence introduced as to co-defendant should be applied only to him. Those rulings are reported in the transcript of the trial, page 358 (March 25, 1970) and in a separate volume of the transcript containing Preliminary Instructions to Jury, Opening Statements, Closing Arguments and Instructions to Jury, at pages 66-68 (March 24 and March 26, 1970).

STATEMENT OF THE CASE

Jurisdictional Statement

This is a criminal appeal from defendant Malvin G. Sheffield's conviction in the United States District Court for the District of Columbia. Defendant was arrested on January 11, 1969, and, after a plea of not guilty, was tried before a judge and jury and convicted on March 26, 1970, on one count of armed robbery, D.C. Code § 22-3202; two counts of assault with a dangerous weapon, D.C. Code § 22-502; and one count of possession of a prohibited weapon, D.C. Code § 22-3214(a). He was sentenced on May 12, 1970, to five (5) to twenty (20) years on the armed robbery count, three (3) to nine (9) years on each of the two assault counts, and one (1) year on the possession count, all sentences to run concurrently.

Notice of this appeal was filed on May 15, 1970. Counsel on appeal was appointed by this Court on July 16, 1970.

The Court's jurisdiction to hear this appeal is based on 28 U.S.C. § 1291 (1964).

STATEMENT OF FACTS:

The Incident

The Seymour Liquor Store, 5581 Central Avenue, S.E., Washington, D.C., was held up at about 9 p.m., Saturday evening, December 7, 1968, by a tall man, a shorter man and two other men. Tr., pp. 6-10.[1/] Apparently, all four were armed, three with revolvers, one with a sawed-off shotgun. The tall man and the shorter man allegedly entered the store a few minutes earlier ostensibly as customers, looked around and left after the taller one bought a bag of potato chips. Tr., pp. 7, 84. This visit took "about three or four minutes," Pre-Trial H'g Tr., p. 18. The holdup itself took about 10 minutes, Tr., p. 19, and resulted in the theft of a sum of money

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1/ References to the transcripts of the various phases of this proceeding will be abbreviated as follows:

Preliminary Hearing Transcript:	Prelim. H'g Tr.
Pre-Trial Hearing Transcript:	Pre-Trial H'g Tr.
Trial Transcript:	Tr.

($715 according to the accounting offered at trial, Tr., p. 184) and a box of blank money orders. Tr., p. 119.

After the holdup, the four left the store and drove away in a black convertible (owned by a Mr. Gorman, Prelim. H'g Tr., p. 18), pursued on foot by one of the owners of the store and followed in a car by a witness to the escape. Tr., pp. 136-7. After a collision with another car at C Street and Benning Road, S.E., the four abandoned the car and fled on foot. Tr., pp. 137-8. There was no pursuit and no arrests were made.

There were several people in the "rather small," Tr., p. 31, "brightly lighted" store, Tr., p. 18, during both visits, including the co-owners of the store, Henry Mates, and his brother, Bernard; two clerks, Carl Banks and Mack Carter; and at least three customers, Clyde Moten, Jimmy Williams and George Banks (Carl's brother). Prelim. H'g Tr., pp. 22-23. Of these seven, only co-owner Henry Mates and clerk Carl Banks claimed throughout to be able to identify any member of the holdup team. Each ultimately identified the co-defendant in the case below, Vincent L. Randolph, as the taller of the two who appeared during both visits, and Mr. Sheffield as the shorter.

The Investigation

Police investigators discovered some fingerprints which were negative "as far as Mr. Sheffield." Prelim. H'g Tr., p. 18, Tr., pp. 190-193. Five days after the robbery, the co-owners of the store, Henry and Bernard Mates, and clerk Carl Banks, identified the two defendants who were tried below from a book of 55-65 photographs shown them at the store. Prelim. H'g Tr., pp. 11-13.

Three lineups were conducted. The first occurred on December 17, 1968, ten days after the robbery and five days after the photographic identification. At that lineup, Mates tentatively identified Vincent W. Turner (Pre-Trial H'g Tr., p. 14) as the "short one" (whom he later alleged to be Mr. Sheffield), Pre-Trial H'g Tr., p. 30. Neither Sheffield nor co-defendant Randolph were in that lineup. Pre-Trial H'g Tr., p. 13. At the second lineup, held January 14, 1969, Henry Mates and Carl Banks identified both defendants from among seven persons. Sheffield, at 5'7", was the shortest person by some three inches in that lineup. See Gov. Exhibit 3 (photograph of the lineup). The third lineup was conducted on July 31, 1969. Again both Sheffield and co-defendant Randolph were in the lineup. The identification witness, Clyde Moten, a customer in the store at the time of the robbery, was unable to identify

either Sheffield or co-defendant Randolph, who were both in the lineup, as participants. Pre-Trial H'g Tr., p. 12.

The Preliminary Hearing

On January 15, 1969, the day following the second lineup at which Sheffield and Randolph were identified by Banks and Mates, a preliminary hearing in this matter was held before Judge Edgerton. The court found probable cause based on Detective Denham's testimony that witnesses had identified the defendants from the book of photographs and at the lineup. Following Denham's testimony, counsel for defendant Sheffield called Carl Banks and examined him with respect to his recollection of the incident and the basis for his identification of the two defendants.

Because the pre-trial and trial testimony given by Banks and the Mates brothers regarding police coaching and their opportunities to observe the holdup men is inconsistent with or contradicts the testimony given by Banks and Officer Denham on these points at the preliminary hearing, the statements made at that hearing are set forth in some detail here.

Coaching

At the preliminary hearing Officer Denham stated that he had talked to both Henry Mates and Carl Banks shortly before they identified the two defendants at the lineup on January 14, 1969. Prelim. H'g Tr., p. 14.

He denied coaching Mates, but the gist of his conversation with Banks is not recorded. Prelim. H'g Tr., pp. 14-15. Banks, however, stated that Officer Denham told him, at the time he served him with the summons to appear at the lineup, that Sheffield would be in it:

> [to Banks]
>
> Q. "Last night did you talk to anyone before the lineup?
>
> A. "No, sir.
>
> Q. "Who told you to come down?
>
> A. "I was at the other job. I was served with a summons by Detective Denim [sic], and he said I had to be down, so he --
>
> Q. "Did you talk to him last night?
>
> A. "I talked when he handed me the summons.
>
> Q. "Where?
>
> A. "On my job.
>
> Q. "Did you have a conversation with him?
>
> A. "He told me I had to come to lineup. <u>The fellows that I had picked in the book were there</u>." Prelim. H'g Tr., p. 28 (emphasis added)

At the preliminary hearing Banks emphasized that the smaller holdup man was very short.

He was, Banks said, "a little short fellow" (Prelim. H'g Tr., p. 22). Asked if he had "any idea how tall he was," Banks testified:

"He were about five feet. He was short.

* * * *

"I say five foot." (Prelim. H'g Tr., p. 24)

At the preliminary hearing Banks also testified about the deployment of all four members of the holdup team and his ability to observe them. One, Mr. Randolph, the co-defendant, stood right across the counter from them holding a .32 revolver. Prelim. H'g Tr., p. 26.

The short fellow, he said, held a shotgun, Prelim. H'g Tr., pp. 23-24, and was "[s]tanding in the corner," Prelim. H'g Tr., p. 26. Asked if he could describe him, he answered "Not too good." Id.[2/] And he could not describe the other two men, who he said were "standing at the door" Prelim. H'g Tr., pp. 25-6, because

> "Well, they made -- lay on the floor so quick, you couldn't hardly see . . . ." Prelim. H'g Tr., p. 26.

Banks also testified at the preliminary hearing that the other clerk, who he identified as Mack Carter, Prelim. H'g Tr., p. 23, had waited on the shorter man during the first visit. Prelim. H'g Tr., p. 24. Carter was not called as a witness by either side at any stage of the proceeding.

2/ Since he had accounted for Randolph and the two unidentified members of the team (see the following sentence in the text), it was apparently the person he identified as Mr. Sheffield who was standing in the corner.

The photographic identifications were made at the store from the book of photographs Officer Denham showed to Henry and Bernard Mates and Carl Banks on December 12, 1968. Officer Denham testified that all three selected Sheffield's picture from the book of photographs. Prelim. H'g Tr., pp. 11-3.

The transcript of this hearing was not available to the defendant at either pre-trial or trial. Although the trial court authorized the record to be transcribed at the expense of the United States in ample time for the trial (see the District Court docket entry for October 31, 1969), it was not actually transcribed until August 3, 1970 (several months after the trial). See the reporter's certificate at p. 30 of the Preliminary Hearing Transcript. The reason that the record was not transcribed in response to the original request is not clear, but it appears that the official court reporter for the preliminary hearing left the employ of the court before transcribing the notes and also that there was some confusion in the Court Reporters' office about the status of the request. See the certificate

and the affidavit of trial counsel attached to this brief as Appendix 1.[3/]

Pre-Trial Hearing

Judge Aubrey Robinson conducted a pre-trial hearing on March 23, 1970, at which he considered whether or not he would admit evidence of the photographic identification of defendant Sheffield and co-defendant Randolph made by Henry Mates and Carl Banks, their lineup identification of the two defendants and their in-court identification of each. Both Henry Mates and Carl Banks testified at the pre-trial as to their opportunity to observe the defendants during the two visits to the store in connection with the Government's contention that both the out-of-court and proposed in-court identifications were admissible.

Henry Mates based his ability to identify Sheffield on the opportunity to "look straight at him," not during the robbery itself, but during the first visit, Pre-Trial H'g Tr., p. 26, when he claimed to have waited on Sheffield. Pre-Trial H'g Tr., pp. 26-27. Mates

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3/ Because the copy of the Preliminary Hearing Transcript ultimately obtained was not transcribed by the original reporter, the certificate attached to it contains the following limitation:

> "I do not certify this transcript as an official transcript nor do I certify it to be a true and correct transcript, but only transcribed to the best of my ability." Prelim. H'g Tr., p. 30.

was not asked to reconcile or explain the statements made by Banks at the preliminary hearing that it had been the other clerk (Mack Carter) who waited on the shorter one during the first visit.

Carl Banks testified that he had looked "directly" at the shorter man during the robbery, Pre-Trial H'g Tr., p. 19, but did not claim to have done so during the first visit. See Pre-Trial H'g Tr., p. 17. Carl Banks was not asked to explain or reconcile his statements in the preliminary hearing that he could not describe Sheffield "too good," or to account for the impediment to the opportunity to observe caused by the fact that he had been forced to "lay on the floor so quick" that he "couldn't hardly see." At the conclusion of the suppression hearing, the judge ruled that he would admit the photographic identification, the lineup identification and the in-court identification of the defendants by the two identification witnesses. Pre-Trial H'g Tr., pp. 45-6.

The Trial

The Government's case against Sheffield consisted of the testimony of Henry Mates and his employee Carl Banks that placed Mr. Sheffield in the store and the statements of each with regard to their opportunity to observe him.

At the trial (some fourteen and a half months after the robbery), Banks again placed the taller defendant with the .32 revolver (whom he identified as Mr. Randolph) across the counter from him, Tr., p. 9, placed the shorter one with the shotgun (whom he identified as Mr. Sheffield) "at the rear end of the store," Tr., p. 9, "by the safe." Tr., p. 47. He also testified that he "didn't pay no attention to" the shorter one during his first visit, Tr., pp. 18-9, and repeated his testimony that "[o]ne of the other clerks went back" to wait on him. Tr., p. 19.

Banks testified that the four members of the holdup team came in together, Tr., p. 40, but did not mention, as he had at the preliminary hearing (five weeks after the robbery), the fact that thereupon he had been made to "lay on the floor so quick" that he "couldn't hardly see," although he did state that the customers were asked to "lay on the floor." Tr., p. 9. Nor did he mention his difficulties in describing the man in the corner (presumably the short one, i.e., Mr. Sheffield), but stated that he looked "directly" at him, Tr., pp. 19-20. Indeed, he gave the impression that he had remained standing until the holdup men were leaving. Tr., p. 10.

Banks also testified, unequivocally, that he had not been coached prior to making the lineup identification of Sheffield:

Q. "On the way down to the lineup, what if anything did Mr. Denham say to you?

A. "He didn't say nothing.

Q. "He said nothing?

A. "No more than general conversation.

Q. "Didn't he tell you that the two men you had picked out of the book of photographs would be there that night?

A. "He didn't tell me nothing of the kind.

Q. "Would you deny that he made that statement to you?

A. "Yes, I would." Tr., pp. 38-39.

Banks was not confronted with his directly contradictory testimony at the preliminary hearing on that point, nor was he asked to reconcile his selection of the 5'7" Sheffield with the five foot tall person he had described at the preliminary hearing.

As he had at pre-trial, Henry Mates based his ability to identify Sheffield on the opportunity to view him close-to that occurred when he had waited on Sheffield during the first visit. Tr., p. 85. Mr. Mates was not asked to reconcile or explain the statement made by Banks at the preliminary hearing that it had been the other clerk (Mack Carter) who waited on the shorter one during the first visit.

In his initial telephone report to the police, Henry Mates stated that the taller of the two men he ultimately identified carried the shotgun. This fact is reflected in the affidavit sworn to by the police officer to support his request for arrest warrants. Tr., pp. 106-108.[4/] At trial, Henry Mates first testified that the shorter man had the shotgun, Tr., p. 85, then, changing his testimony, said the taller man carried the shotgun, Tr., p. 87, and then changed his testimony yet another time. Tr., pp. 88-89.

Henry Mates, who had tentatively identified a Mr. Turner as the short one at the first lineup gave the following explanation for the discrepancy:

> "[I]t looked like him, but I wasn't positive, because I didn't see the other one there." Tr., p. 113.

Co-owner Bernard Mates, called by the Government to testify as to the amount of money stolen, was asked whether he was able to identify either of the defendants on trial. He could not, he said, because he had been on the phone when the holdup team entered.

> "I didn't observe anything. All I heard was, 'Hold-up, everybody lay down.' So, I laid down." Tr., p. 189.

4/ The original affidavit is contained in the record on appeal as an attachment to the complaint seeking the warrant.

He was not asked to explain how it came about, therefore, that he had been able to identify Sheffield as one of the holdup men from the pictures shown him by Officer Denham on December 12, 1968.

Defense witness Clyde Moten, a customer in the store at the time of the robbery, who had been unable to identify Sheffield at the third lineup, Tr., p. 213, also was unable to recognize him at trial, Tr., p. 214.

In connection with its examination of certain of the defense witnesses, the Government showed that the two defendants were acquainted. Tr., p. 221.

Defendant Sheffield presented an alibi defense. He had, he testified, attended a party at the time of the holdup. His alibi was corroborated by a number of other persons who were at the party and was not refuted by the Government. Co-defendant Randolph presented a separate alibi defense claiming that he had been present at the Burrell Cleaners about the time the robbery began. Tr., pp. 281-283. The Government refuted Randolph's alibi with machine records from the alarm company serving the shop which showed that no one was present in the shop at the time Randolph claimed he was there. Tr., pp. 340-41.

Because he considered the testimony rebutting co-defendant's separate alibi would prejudice Sheffield,

counsel for Sheffield asked the court to instruct the jury that the rebuttal testimony be considered only as to Randolph. Tr., p. 358; Transcript of Preliminary Instructions, etc., pp. 66-68. The trial court denied this request and gave, instead, a general instruction to the jury requiring separate consideration of the evidence. Transcript of Preliminary Instructions, etc. p. 81.

The jury found both defendants guilty. Sheffield was convicted of armed robbery, two counts of assault with a dangerous weapon and one count of possession of a prohibited weapon. He was sentenced to five to twenty years on the armed robbery count, three to nine years on each of the assault counts and one year on the possession count, all sentences to run concurrently.

SUMMARY OF ARGUMENT

I

Defendant Sheffield was denied effective representation because his court-appointed counsel proceeded with the pre-trial hearing on the admissibility of out-of-court eyewitness identifications and with the trial itself without obtaining the transcript of the preliminary hearing. The duty to obtain and evaluate the transcript is encompassed within the vital minimum of investigation and preparation required for effective representation. Mr. Sheffield's

defense was seriously prejudiced by the absence of the transcript. Counsel's decision to proceed without it at the pretrial hearing effectively precluded the defendant from challenging the propriety of the lineup, the eyewitnesses' claim that they were able to view the holdup men well enough to make the critical identifications, and their qualification to make in-court identifications. At trial the lack of the transcript precluded the defendant from cross-examining the two eyewitnesses about prior inconsistencies regarding key issues in the case.

II

Since Mr. Sheffield and his co-defendant offered separate alibis, it was prejudicial error for the trial court to deny Mr. Sheffield's motion for an instruction warning the jury that rebuttal evidence which seriously undermined a critical aspect of the co-defendant's alibi not be considered in determining defendant Sheffield's guilt or innocence. The need for such an instruction was particularly acute since the Government had sought to show that the two were acquaintances, had acted together in both stages of the robbery, and then argued to the jury that the weakness in the co-defendant's alibi was a good reason for doubting defendant Sheffield's alibi. Because of the importance of the alibi issue, and the centrality of credibility as an issue in this case, Mr. Sheffield was seriously prejudiced by the court's refusal to give the limiting instruction to the jury.

ARGUMENT

I. APPELLANT WAS DENIED EFFECTIVE REPRESENTATION OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT BECAUSE OF HIS COUNSEL'S FAILURE TO OBTAIN AND EVALUATE THE PRELIMINARY HEARING TRANSCRIPT AS PART OF THE INVESTIGATION AND PREPARATION OF THE DEFENSE CASE.

Mr. Sheffield was denied effective representation of counsel in the preparation for and conduct of the pre-trial and trial proceedings. As a result, he did not receive a fair trial and is entitled to reversal of his conviction and a remand for new proceedings.

A. Court-Appointed Counsel Failed To Afford Effective Representation Because He Proceeded With The Pre-Trial Hearing And Trial Without Obtaining and Evaluating The Transcript Of The Preliminary Hearing.

> (The Court's attention is directed to the following parts of the record: Tr., pp. 189, 214.)

As we shall show, Mr. Sheffield's defense was critically handicapped because of the failure of the court reporter at the preliminary hearing to prepare a transcript of the hearing, and his counsel's subsequent failure to obtain and evaluate the transcript in preparation for the pre-trial hearing on the admissibility of the witnesses' out-of-court identification and for the trial itself. If the

transcript had been available, counsel would have had substantial evidence at his command to demonstrate that the lineups at which Mr. Sheffield was identified were illegally suggestive, as well as facts tending to show serious discrepancies and conflicts in the eyewitness testimony.

Despite the obvious importance of the preliminary hearing testimony -- as a means for attacking the entire case against his client at both the pre-trial hearing and the trial itself -- counsel sought no remedy when the court reporter failed to produce it in response to the trial court's initial authorization and did not object to going forward without the transcript.[5/]

Counsel's willingness to proceed without the transcript cannot be justified on any generalized view that preliminary hearing transcripts are not useful in preparation for trial. This Court's consistent view negates any such justification. The right of a defendant in the District of Columbia to utilize the preliminary hearing to discover the basis of charges against him and

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5/ See the affidavit of court-appointed counsel attached as Appendix 1. It appears that a further formal request or perhaps even diligent informal requests would have produced the transcript. As the record on appeal makes clear, the court reporters office had the notes and transcribed them in response to the authorization signed by Judge Robinson on August 7, 1970.

the evidence comprising the Government's case is as well established as the right to the hearing itself. See Blue v. United States, 119 U.S. App. D.C. 315, 342 F.2d 894, 901 (1964), cert. denied, 380 U.S. 944 (1965); Ross v. Sirica, 127 U.S. App. D.C. 10, 380 F.2d 557, rehearing en banc denied, 127 U.S. App. D.C. at 15, 380 F.2d at 561 (1967).

Ultimately, it is the transcript -- the record of the preliminary hearing -- that gives the right its meaning, and thus the right to a transcript has been accorded constitutionally protected status. Cf., Roberts v. LaVallee, 389 U.S. 40 (1967).[6/] The transcript is "needed to vindicate legal rights," id. at 42, because it provides the means for the perpetuation of "the fresh memory of witnesses" and therefore the basis for "impeachment or refreshing of recollection at trial." Washington v. Clemmer, 119 U.S. App. D.C. 216, 218, 339 F.2d 715, 717, rehearing en banc denied, 119 U.S. App. D.C. at 221, 339 F.2d at 720 (1964); accord, Gardner v. United States, 132 U.S. App. D.C. 331, 407 F.2d 1266, cert. denied, 395 U.S. 911 (1969). Since

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6/ On the strength of LaVallee, this Court has recently held that it is "essential" that "every preliminary hearing be transcribed . . . regardless of whether any request for transcription is made." Gardner v. United States, 132 U.S. App. D.C. 331, 333, 407 F.2d 1266, 1268, cert. denied, 395 U.S. 911 (1969).

the transcript performs such an important function, this Court presumes that "every counsel who enters a criminal case will . . . review the preliminary proceeding and determine whether or not a defect of substance has occurred." Blue v. United States, supra, 119 U.S. App. D.C. at 321, 342 F.2d at 900.

Counsel's decision not to seek the preliminary hearing transcript cannot be justified as a matter of trial tactics.[7/] Whatever discretion a lawyer has to select the manner in which he conducts the defense, a necessary prerequisite to effective selection of tactics must be adequate preparation for trial and adequate investigation of the evidence that might assist in the defense. Where, as here, a preliminary hearing has been held, it is obviously essential that such trial judgments be based on an evaluation of the preliminary hearing transcript.

7/ On the question of the reviewability of trial tactics, see, e.g., Mitchell v. United States, 104 U.S. App. D.C. 57, 259 F.2d 787, cert. denied, 358 U.S. 850 (1958); Goodwin v. Swenson, 287 F. Supp. 166, 176 (W.D. Mo. C.D. 1968):

> "Cases involving the actual conduct of the trial and the making of a reasonable choice of rational alternatives (questions not present under the facts of this case) are infinitely more difficult to judge and additional principles come into play . . . "

The importance attached to the transcript by this Court demonstrates that an attorney going forward without it may well jeopardize his client's defense because of his inability to adequately investigate the case or prepare for trial. And the courts have consistently made it clear that effective representation requires at least that modicum of effort necessary to discover, obtain and evaluate readily available information essential to a key aspect of the defense. Thus:

> "Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed . . . . An omission or a failure to abide by these requirements constitutes a denial of effective representation . . . " Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849 (1968) (footnote omitted).

The investigation must be conducted in part to discharge "counsel's duty to consider the defendant's special interest in cross-examination of witnesses . . . and in making of argument." Williams v. Beto, 354 F.2d 698,

705 (5th Cir. 1965). See also, Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); Goodwin v. Swenson, 287 F. Supp. 166 (W.D. Mo. C.D. 1968).

Both Brooks v. Texas and Goodwin v. Swenson involved situations, analogous to this one, in which counsel had failed to seek and obtain readily available medical reports in connection with the preparation of insanity defenses on behalf of their indigent clients. Finding that the failure had deprived the defendants of effective representation, the courts, in each case, ordered a new trial. The Goodwin court stated that it was not the general competence of the trial lawyer that was at issue in evaluating the claim of ineffective representation, but the impact of the failure to obtain the report on the ability to conduct the defense:

> "The most able and competent lawyer in the world cannot render effective assistance if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justiciable defense." Goodwin v. Swenson, supra, 287 F. Supp. at 182 (footnote omitted).

This Court recently suggested that the ultimate standard of effectiveness applicable when a court-appointed attorney had exhibited a "lack of adequate representation in the preparation and trial" was the determination whether he had been reduced to a "pro forma" defense. United States v. Hammonds, ___ U.S. App. D.C. ___, 425 F.2d 597, 604 (1970).

It is difficult to imagine a case in which impeachment of eyewitnesses by using the record of their "fresh memory" could be more important to a defendant and where failure to prepare for such impeachment could so reduce the defense to the "pro forma" level. The Government's case against defendant Sheffield was marginal at best. Out of the seven people in the small liquor store for all or part of the ten-to-twenty minute period involved, the Government could find only two able to testify that Mr. Sheffield had been there. At least two of the others testified that they could not make the identification. Tr., pp. 189, 214. There was absolutely no objective corroboration, no fingerprints, no pursuit and arrest; nothing tying the defendant to the crime but the two eye-witnesses. Nor was there any proven inaccuracy in the four-witness alibi Mr. Sheffield presented.

In short, the Government's case depended upon the credibility of its two witnesses and upon the propriety and persuasiveness of their out-of-court identifications. And it was on precisely these points that the untranscribed preliminary hearing transcript contained the evidence most damaging to the Government's case.

B. Defendant Sheffield Was Prejudiced By His Court-Appointed Counsel's Failure To Use The Preliminary Hearing Transcript As A Basis For Challenging The Admissibility Of The Eyewitness Identifications.

(The Court's attention is directed to the following parts of the record: Gov. Ex. 3, Preliminary Hearing Transcript, pp. 1-30; Pre-Trial Hearing Transcript, pp. 17-20, 46; Trial Transcript, p. 131.)

On the day before the trial, the court held a hearing on whether to suppress the out-of-court identifications made by the two Government witnesses and whether to permit in-court identifications by either. The primary ground covered at this hearing was the opportunity Henry Mates and Carl Banks had to observe the defendants during the robbery (and the associated preliminary visit), and the circumstances surrounding the out-of-court identifications made of the defendants from their pictures and at the lineups. The testimony at the preliminary hearing would have provided counsel for Sheffield with material and damaging evidence on all three points. Indeed, as we will show, its effective

use might well have led to an adverse ruling on the admissibility of the identifications and hence to the dismissal of the charges against Sheffield. The lack of the preliminary hearing transcript put these possibilities beyond the reach of Sheffield and deprived him of effective representation at an extremely critical stage in the proceeding.

It was established at the pre-trial that Banks and Henry Mates had identified Sheffield twice -- first from photographs shown them by the investigating officer at the store five days after the holdup; and, second, at a lineup held more than five weeks after the event.[8/] At the conclusion of the pre-trial hearing, the trial judge held that both out-of-court identifications by both witnesses were admissible:

> "[T]here is nothing to suggest from the evidence that there was not an opportunity to make the initial observation, and there is no showing that the lineup was improper in any fashion." Pre-Trial H'g Tr., p. 46.

As the preliminary hearing transcript makes absolutely clear, however, there was, in fact, a great deal to suggest both

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8/ Two other lineups were held in this case. At one, held before the lineup described above, Mates tentatively identified another person as the shorter holdup man. At the other, a customer was unable to identify Sheffield as one of the holdup men.

lack of opportunity to observe and impropriety in the lineup procedure.

The Identification by Banks

Opportunity. In his pre-trial hearing testimony, Banks was unequivocal about his ability to observe Mr. Sheffield during both his first and second visits to the store. Pre-Trial H'g Tr., pp. 17-20. Yet, at the preliminary hearing, when the events were still fresh in his mind, Banks appeared much less certain about his ability to observe Sheffield closely enough to make an identification. For example, when asked if he could describe the holdup man he later alleged to be Mr. Sheffield, Banks replied "not too good." Prelim. H'g Tr., p. 26. Banks also testified that he had no good opportunity to observe the two at the door (who apparently entered at the same time as the others), because:

> "Well, they made -- lay on the floor so quick, you couldn't hardly see -- "
> Prelim. H'g Tr., p. 26.

If Banks had, as he claimed, a clear opportunity to observe the shorter defendant, his firm description of him at the preliminary hearing as "a little short fellow," Prelim. H'g Tr., p. 22, "five feet" tall, "I say five foot," Prelim. H'g Tr., p. 24 -- that is, as a near-midget -- simply does

not square with his selection of the much taller (5'7") Sheffield at the lineup as the man in question. Banks, however, was not confronted with this striking discrepancy when he was being examined at the pre-trial hearing about his opportunity to observe the shorter holdup man during the robbery.[9/]

Coaching. Banks identified the 5'7" Sheffield as "the shorter one" from a seven-man lineup conducted January 14, 1969, in which Sheffield was the shortest -- by a markedly perceptible 3 inches -- of the seven men in the lineup. (See Gov. Exhibit 3) At the preliminary hearing the next day, Banks admitted that he had been told by Officer Denham, the policeman who conducted the field investigation, that the man he had selected from the photograph book as the shorter one would be in the lineup:

> Q. "Did you have a conversation with [Officer Denham] on the way to the lineup?
>
> A. "He told me I had to come to lineup. The fellows that I had picked in the book were there." Prelim. H'g Tr., p. 28 (emphasis added)

Thus, there was a clear statement in the untranscribed record of the preliminary hearing that Banks had been coached by the police prior to the lineup that Sheffield would be in it. Acting without the transcript, counsel for Sheffield was

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9/ Counsel for Sheffield conducted no cross-examination at the pre-trial hearing.

unable to confront Banks with his earlier testimony and raised no objection on the prompting ground to the admission of Banks' lineup identification at the upcoming trial. Yet, as this Court has suggested, the police practice of telling a witness that suspects he selected from the police photographs will appear in the lineup he is about to view renders the identification inadmissible. See Clemons v. United States, 133 U.S. App. D.C. 27, 41, 408 F.2d 1230, 1244 (1968); see Hawkins v. United States, 137 U.S. App. D.C. 103, 420 F.2d 1306, 1308-09 (1969); Gregory v. United States, 133 U.S. App. D.C. 317, 321-323, 410 F.2d 1016, 1020-1022 (1969). If the coaching alone was not enough to taint the identification, the additional fact that defendant Sheffield was the only "short fellow" in the lineup violated the fundamental fairness test established by Stovall and called for its exclusion. Stovall v. Denno, 338 U.S. 293 (1967). See Gregory v. United States, supra, 133 U.S. App. D.C. at 322, 410 F.2d at 1021; People v. Castillo, ___ N.E.2d ___, 8 CrL 2031, Ill. App. Ct. (9/22/70 synopsis) (placing two Mexican defendants in lineup with two "Anglo" policemen who were 70 to 90 pounds heavier and 3 to 4 inches taller held to violate Stovall).

Since Banks obviously had keyed his identification to height, and he remembered the smaller holdup man as "a little short fellow," it was highly prejudicial to Sheffield that he was the shortest, by far, of any person in the lineup Banks viewed.

The Identification by Henry Mates

Opportunity. Henry Mates' claim at the pre-trial hearing that he had an adequate opportunity to observe the man he subsequently identified as Mr. Sheffield is based primarily on his assertion that he looked straight at him from close-up as he waited on him when the two holdup men came in the store the first time:

> Q. "When you went over to wait on him, how close did you get to him?
>
> A. "I walked over next to him.
>
> Q. "Did you look straight at him?
>
> A. "Yes sir I did." Pre-Trial Tr., p. 26.

Henry Mates, however, was not confronted with Banks' testimony that it had been the clerk Mack Carter who had waited on the shorter holdup man during the first visit. Prelim. H'g Tr., p. 24. Nor was Henry Mates confronted with the fact that he had picked the 5'7" Sheffield from the lineup, although witness Banks had testified unequivocally at the preliminary hearing that the shorter one was "five feet" tall.

Had counsel been in a position to bring out these inconsistencies, he could have cast substantial doubt on the accuracy of Mates' powers of observation, a doubt already raised by the fact that Mates had tentatively identified a totally unrelated third person as the shorter defendant at an earlier lineup at which defendant Sheffield was not present.

Coaching. Henry Mates was not called as a witness at the preliminary hearing and was not cross-examined at the pre-trial hearing on the possibility that he had been coached by Officer Denham prior to his identification of Sheffield at the January 14 lineup. Officer Denham did testify at the preliminary hearing that he had talked to Henry Mates before Mates viewed the lineup, but denied that he told him that Sheffield would be in the lineup. Prelim. H'g Tr., p. 15. However, in view of Banks' statement that he had been coached by Officer Denham and in view of Denham's statement that he had talked to Mates prior to the lineup, it appears that the judge would have permitted examination of Mates on this point at the pre-trial hearing. 10/

10/ When counsel for co-defendant Randolph sought to examine Mates on this point at the trial itself, the judge sustained an objection to a leading question on this point, but said he would accept "a proffer . . . if you have a statement from Denim [sic]." Tr., p. 131.

Whatever the facts with respect to coaching, the lineup as observed by Henry Mates was subject to the same infirmity when observed by Banks -- the 5'7" Sheffield was the only short person in the seven-man lineup -- and Mates, like Banks, had his mind on a short person.

As the foregoing shows, the transcript of the preliminary hearing would have permitted counsel to mount a serious challenge to the eyewitnesses' power to observe, to the fairness of the lineup and, ultimately, to the judge's holding that the out-of-court identifications of Sheffield by the two witnesses were admissible.

Had the lineup identifications been excluded, in-court identifications would have been permitted only if the court could find that they were the product of a source independent of the unnecessarily suggestive pre-trial identification. United States v. Wade, 388 U.S. 218 (1967); Clemons v. United States, supra, 133 U.S. App. D.C. at 34, 408 F.2d at 1237. Yet in no case decided in this Circuit has the Court held that an in-court identification proceeded from an independent source on a combination of facts similar to this case; that is, (1) where one witness grossly misdescribed the defendant, compare United States v. Kemper, D.C. Cir., No. 22,558, slip op. at 10,

13-14 (July 10, 1970); Hawkins v. United States, supra, 137 U.S. App. D.C. at 105, 420 F.2d at 1308; Gregory v. United States, supra, 133 U.S. App. D.C. at 324, 410 F.2d at 1023-24; Clemons v. United States, supra, 133 U.S. App. D.C. at 38, 408 F.2d at 1241 (identification by Mrs. Parker); (2) where the eyewitnesses did not view "mug shots" until five days after the robbery, compare Simmons v. United States, 390 U.S. 377 (1968) (one day); Bryson v. United States, 136 U.S. App. D.C. 113, 419 F.2d 695, 700 (1969) (immediately after robbery); and (3) where the opportunity for the witnesses to view the robbers both before and during the robbery was called into serious question by testimony at the preliminary hearing, compare United States v. Kemper, supra, at 8-9 (good opportunity to observe); Gregory v. United States, supra, 133 U.S. App. D.C. at 45, 47, 408 F.2d at 1248, 1250 (same). Therefore, the transcript of the preliminary hearing would have provided counsel for defendant a basis to seek to obtain exclusion of the in-court identifications, as well as the out-of-court identifications. If that had happened, of course, there would have been no trial since the entire case against defendant Sheffield was based on the identifications of him by Banks and Henry Mates.

C. Mr. Sheffield Was Prejudiced By His Court-Appointed Counsel's Failure To Use The Preliminary Hearing Transcript As A Basis For Impeaching The Identification Testimony Given By The Government's Identification Witnesses At Trial.

(The Court's attention is directed to the following parts of the record: Tr., pp. 38, 39, 190; Prelim. H'g Tr., pp. 11-13, 24-25, 28; Officer Denham's affidavit attached to the complaint seeking a warrant for defendant Sheffield's arrest.)

At the trial, the credibility of the two Government identification witnesses was essential to the Government's case. Had the jury disbelieved their testimony that Sheffield took part in the robbery, there was no basis remaining on which they could find him guilty. Had he obtained the preliminary hearing transcript, counsel for Sheffield would have had an opportunity to discredit the credibility of the Government witnesses time and time again by comparing the testimony at trial with the contradictory assertions made by Banks at the preliminary hearing.

Against Banks' claim at trial that he had a clear opportunity to identify Sheffield would stand his early admission that he couldn't describe Sheffield "too good" and that he "lay on the floor so quick he couldn't hardly see." Against his selection of the 5'7" Sheffield

as the "short one" would stand his earlier description of the short holdup man as five feet tall. (See Statement of the Case, supra, pp. 6-9, for references to the record.) Against his firm claim at trial that he had not been told by Denham prior to the lineup that Sheffield would be on display would stand his preliminary hearing admission that he had been effectively told that Mr. Sheffield would be there:

> Q. [at trial] "On the way down to the lineup, what if anything did Mr. Denham say to you?
>
> A. "He didn't say nothing.
>
> Q. "He said nothing?
>
> A. "No more than general conversation.
>
> Q. "Didn't he tell you that the two men you had picked out of the book of photographs would be there that night?
>
> A. "He didn't tell me nothing of the kind.
>
> Q. "Would you deny that he made that statement to you?
>
> A. "Yes, I would." Tr., pp. 38-39.

This was the point, certainly, to confront Banks with the contradictory account he had given at the preliminary hearing fourteen months before:

Q. [at the preliminary hearing] "Last night did you talk to anyone before the lineup?

A. "No, sir.

Q. "Who told you to come down?

A. "I was at the other job. I was served with a summons by Detective Denim [sic], and he said I had to be down, so he --

Q. "Did you talk to him last night?

A. "I talked when he handed me the summons.

Q. "Where?

A. "On my job.

Q. "Did you have a conversation with him?

A. "He told me I had to come to lineup. The fellows that I had picked in the book were there." (emphasis added) Prelim. H'g Tr., p. 28.

Banks' contradiction is blatant and stark -- certainly strong enough to shake the jury's confidence in his credibility. Yet, the transcript that would have made it possible to confront Banks with the evidence of the contradiction was not available to defendant Sheffield.

Mr. Sheffield was also deprived, by lack of the transcript, of the opportunity to impeach the Government's other eyewitness, co-owner Henry Mates. Against Mates' claim that he had waited on Mr. Sheffield during his first visit to the store, the jury would place Banks' testimony that it was the other clerk, not Mates, who

waited on Mr. Sheffield. Against Mates' claim that the 5'7" Mr. Sheffield was the shorter of the two holdup men, the jury would place Banks' firm description of the shorter man as "five feet" tall, as a "little short fellow." (See Statement of the Case, supra, pp. 7-8, for references to the record.)

Unless Mates had been able to persuade the jury that Banks had been wrong about the shorter man's height (which would have required one Government witness to discredit the other), the jury might well have been more troubled by the inconsistencies in Mates' testimony at trial as to which defendant held the shotgun and by his tentative misidentification of Sheffield at the first lineup. (See Statement of the Case, supra, p. 14.)

The lack of the transcript at trial was prejudicial on another count; it could have been used to challenge the testimony given by Bernard Mates that he was not in a position to say whether or not Sheffield was one of the holdup team even though he had been present during both visits. Tr., p. 190. Banks' preliminary hearing testimony on this point, while somewhat confusing, strongly indicates that Bernard Mates had viewed the shorter holdup man. Prelim. H'g Tr., pp. 24-25. That fact, plus the fact that Bernard Mates had

originally picked Sheffield's picture from the mug book as one of the holdup men, a fact also contained in the preliminary hearing transcript, pp. 11-13, would have offered counsel for Sheffield a clear opportunity not only to impeach Bernard Mates, but to argue that he had concluded that the Government had picked the wrong short man.

The magnitude of these lost opportunities to impeach the two Government identification witnesses demonstrates that defendant's right to cross-examine his accusers was materially circumscribed. The doubt that might have been planted in the minds of the jurors by any of these potential, but lost, points could have been enough to change the outcome. The cumulative impact of all of them almost certainly would have. But whether or not the outcome was changed, it is clear that the lack of the transcript deprived Sheffield of any opportunity to realize the benefits of cross-examination based on its contents. Without the cross-examination, he was effectively denied what the Supreme Court has described as "one of the fundamental guarantees of life and liberty," and "one of the safeguards essential for a fair trial." Painter v. Texas, 380 U.S. 400, 404 (1965); see Berger v. California, 393 U.S. 314, 315 (1969). And, as a result, he was denied effective representation of counsel in violation of the Sixth Amendment. Powell v. Alabama, 287 U.S. 45, 71 (1932); United States v. Hammonds, ___ U.S. App. D.C. ___, 425 F.2d 597, 601 (1970).

II. THE TRIAL COURT'S DENIAL OF DEFENDANT'S REQUEST FOR A LIMITING INSTRUCTION AS TO TESTIMONY REBUTTING THE SEPARATE ALIBI OF THE CO-DEFENDANT WAS, UNDER THE CIRCUMSTANCES OF THIS CASE, PREJUDICIAL ERROR.

A. When Co-defendants are Jointly Tried, They are Entitled to Instructions Cautioning the Jury that Evidence Introduced as to One Defendant Should be Applied Only to Him.

(The Court's attention is directed to the following parts of the record: Tr., pp. 83, 221, 333, 358; Transcript of Preliminary Instructions, etc., pp. 55-56, 66-68, 78, 80, 81, 88, 92.)

Both Mr. Sheffield and his co-defendant testified on their own behalf at the trial. Mr. Sheffield (and other defense witnesses) testified that he was at a party at the time of the robbery. His co-defendant similarly presented alibi evidence to show that he was at a dry cleaning establishment at the time the robbery began, but, in rebuttal, the Government presented highly persuasive evidence to disprove the claim that the co-defendant was in the shop when the robbery began.[11/]

This rebuttal witness was the last witness to testify, Tr., p. 333. Very soon thereafter, counsel for

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11/ See Statement of Facts, supra p. 15.

Mr. Sheffield requested that the court instruct the jury to disregard the testimony of the rebuttal witness as to Mr. Sheffield, Tr., p. 358. The court refused the request, stating that the jury did not require the instruction. Trial counsel renewed his request the next day, before general instructions were given to the jury. The court again denied the request on the ground that it was sufficient to instruct the jury to consider the evidence individually with respect to each defendant. Transcript of Preliminary Instructions, etc., pp. 66-68.

Thereafter, in its instructions to the jury, the trial court in summarizing the testimony mentioned the alibi evidence presented by Mr. Sheffield and his co-defendant, but gave only the following limited instruction regarding it:

> "If, after a full and careful consideration of all the evidence in this case, you find that the Government has failed to prove beyond a reasonable doubt that a defendant on trial in this case was present at the time when and the place where this liquor store robbery took place, then, as to that defendant again, you must find him not guilty." Transcript of Preliminary Instructions, etc., p. 81.

The court also referred in its general instructions to the fact that the case had to be proven by the Government "as to each defendant." Id. at 78[12/]

The court's refusal to give a specific instruction as to the rebuttal witness' testimony, constitutes prejudicial error requiring reversal of Mr. Sheffield's conviction.

Courts have consistently recognized the substantial danger that evidence regarding only one co-defendant in a joint trial may be used by the jury to determine the guilt of the other defendant as to whom the evidence was not relevant. E.g., Logan v. United States, 144 U.S. 263, 309 (1891); Hendrey v. United States, 233 F. 5, 17 (6th Cir. 1916).

12/ The trial court further instructed that the Government had the burden to prove the identity of each defendant, Id. at 80, and had the burden of proving all of the elements essential to the crimes charged as to each defendant, Id. at 88. The court also pointed out that only the co-defendant was charged with the offense of carrying a concealed weapon, Id. at 92.

In Hendrey, convictions of certain alleged co-conspirators[13] were overturned inter alia because "evidence was admitted concerning the statements or the acts of one respondent without restricting or cautioning the jury that such evidence would be of force only against that one respondent." 233 F. at 17. The court warned:

> "Due protection of the rights of other respondents requires that the jury should be expressly cautioned to this effect, and warned that they must not consider the evidence as affecting other respondents, and that, if it is not practicable to give such caution every time that such evidence is received, it must, at least, be repeated frequently enough to be sure that the jury keep the rule in mind . . . ." Id. (emphasis added).

Furthermore, where the evidence pertaining to one

13/ As the Hendrey court indicated, when a conspiracy is charged, statements and actions of co-conspirators can be admitted into evidence as against all of the co-conspirators. 233 F. at 17. See also Logan v. United States, 144 U.S. 263, 308-09 (1891); United States v. Rosenbloom, 176 F.2d 321 (7th Cir.), cert. denied, 338 U.S. 893 (1949). However, once the conspiracy has been terminated, statements of the co-conspirators, or their acts, unless relevant to show the conspiracy, are not admissible against other than the declarer or actor. United States v. Chase, 372 F.2d 453, 460 (4th Cir.), cert. denied, 387 U.S. 907 (1967). Thus, the rules of evidence are the same for evidence of acts or statements taking place outside the bounds of a conspiracy as for evidence of acts or statements relevant to only one co-defendant in a joint trial in which conspiracy is not charged.

defendant's acts was

> "prima facie . . . individual rather than joint, it is almost . . . essential that the final charge to the jury should carefully point out the conditions under which evidence of what one did or said may rightfully affect another's guilt." (Id.) (Emphasis added).14/

The rule that such limiting instructions are required is so well recognized that many courts have held that evidence as to statements or acts of one co-defendant was admissible in a joint trial with other defendants because adequate instructions were given limiting the application of the evidence to the appropriate defendant only. See, e.g., Delli Paoli v. United States, 352 U.S. 232, 238, (1957); United States v. Bowe, 360 F.2d 1, 13-14 (2nd Cir. 1966); Costello v. United States, 255 F.2d 389, 395 (8th Cir.), cert. denied, 358 U.S. 830 (1958); Jefferson v. United States, 309 F.2d 380, 381 (9th Cir. 1962); United States v. Griffin, 176 F.2d 727, 729 (3rd Cir. 1949), cert. denied, 338 U.S. 952 (1949); Rice v. Warden, 237 F. Supp. 463, 466 (D.Md. 1964); United States v. Verra, 203 F. Supp. 87, 91 (S.D.N.Y. 1962); United States v. Thomas, 52 F. Supp. 571, 585 (E.D. Wash. 1943).

14/ This is true whether the evidence introduced concerns statements of co-defendants, or their acts. United States v. Chase, 372 F.2d 453, 460 (4th Cir.), cert. denied, 387 U.S. 907 (1967); citing Lutwak v. United States, 344 U.S. 604, 617-18 (1953).

This Court has followed a similar rule in approving the use of evidence relating to individual co-defendants because an appropriate instruction had been given. E.g., Coleman v. United States, 125 U.S. App. D.C. 246, 249 n. 3, 371 F.2d 343, 346 n. 3 (1966) cert. denied, 386 U.S. 945 (1967); Robinson v. United States, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 32 (1954); Hall v. United States, 83 U.S. App. D.C. 166, 168, 168 F.2d 161, 163, cert. denied, 334 U.S. 853 (1948); Holmes v. United States, 56 App. D.C. 183, 189, 11 F.2d 569, 575 (1926).

Where adequate instructions are not given, however, appellate courts have overturned convictions of a defendant prejudiced by the failure to do so. Thus, in United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967), co-defendants had been convicted of conspiracy to violate prohibitions against interstate gambling. Evidence was admitted tending to show acts of certain of the alleged co-defendants after the termination of the conspiracy. The Court of Appeals reversed the conviction of one of the co-defendants about whom no evidence of subsequent actions was introduced, on the ground, inter alia, that the trial court had "failed to limit, carefully and clearly, the jury's consideration of evidence . . ." of actions by one of the alleged

co-defendants as to another of the defendants. 372 F.2d at 460 (emphasis added). The Court of Appeals was concerned that the jury would rely on the actions of one of the co-defendants after the date of the conspiracy in "determining the guilt or innocence" of the other co-defendant (Id.).

Absent careful and clear instructions that the evidence rebutting his co-defendant's alibi should not be applied to Mr. Sheffield, the jury was free to rely on it as a basis for disbelieving Mr. Sheffield's testimony and alibi. This danger was particularly great in light of the Government's attempt to identify Mr. Sheffield and his co-defendant as acting in concert. Evidence was introduced that they were acquainted, Tr., p. 221, and had entered the store together just prior to the robbery, Tr., p. 83. Both co-defendants were identified together by the eye-witnesses and implicated together throughout the trial proceedings. See Statement of Facts, supra, pp. 3-6, 14. It is therefore altogether possible that the jury's conclusion that the co-defendant's alibi was untrue led it to conclude that Mr. Sheffield's alibi was similarly defective.

Indeed, the Government's closing argument attacking Mr. Sheffield's alibi was clearly designed to utilize fully this possibility. In responding to trial counsel's closing argument that Mr. Sheffield's alibi was uncontroverted and that it rang true, the Assistant United States Attorney stated:

> " . . . I would like to start by answering . . . [Sheffield's counsel's] question, and that is whether Mr. Sheffield could have dreamed up a better story, to use . . . [counsel's] language. I would submit to you, ladies and gentlemen, that probably he couldn't have.
>
> "We have seen what happens when we look at Mr. Randolph's story. . . .
>
> "The fatal mistake was, of course, that there was a burglar alarm system in that store . . . which said clearly and beyond any mathematical doubt that there was nobody in that store after 8:05 that night.
>
> "So that wasn't a real good alibi. But the story of being at a party [Mr. Sheffield's alibi], and the only people there you really remember are your friends or your relatives or their relatives . . . that's a pretty good story, because you don't have any burglar alarm system or any mathematical evidence where you can prove beyond a reasonable doubt that somebody is telling a lie. You have got to listen carefully to the testimony of the witnesses when you have that kind of alibi." Transcript of Preliminary Instructions, etc., pp. 55-56.

The trial court, however, made no effort to avoid this prejudicial, improper and totally unjustified conclusion with an appropriate limiting instruction. The court did not, with the detail or explicitness required in other courts,[15] treat the possibility that the rebuttal evidence as to the co-defendant would be used by the jury in determining Mr. Sheffield's guilt. In this regard, its instructions did not meet the standards of the model instruction contained in the Criminal Jury Instructions published by the District of Columbia Bar Association:

> "Certain evidence was admitted only with respect to a particular defendant, and not against any other defendant. You may consider such testimony only with respect to the defendant against whom it was offered. You must not consider it in any way in your deliberations with respect to any other defendant." D.C. Bar Association, Criminal Jury Instructions, Instruction No.

15/ For example, see the instruction approved in United States v. Griffin, 176 F.2d 727 (3rd Cir. 1949), cert. denied, 338 U.S. 952 (1950), where the trial court, referring to testimony of one defendant given after a conspiracy had been terminated: "[U]nder no circumstances should you consider it damaging evidence or evidence at all against the [other] defendant . . . ." 176 F.2d at 729. See also the charge approved in Wilkes v. United States, 80 F.2d 285 (9th Cir. 1935): "You are instructed that all of the evidence that has been received in this case is not applicable to all of the defendants. Only such evidence as tends directly to connnect a particular defendant with the offense charged in the indictment can be considered by you in determining the guilt of that defendant . . . ." 80 F.2d at 290.

33: "Evidence Admitted Against One Defendant Only," 18 (1966), citing Robinson v. United States, 93 U.S. App. D.C. 347, 349, 210 F.2d 29, 31 (1954).

With only the sparse instructions given by the trial court to guide it, the jury was left unguided. Yet, when Mr. Sheffield's counsel requested a limiting instruction, the court simply concluded that the jury "is not stupid," Tr., p. 358, and could distinguish the testimony relevant to one co-defendant. However, the basic reason for instructing a jury is that it needs guidance from the court to determine the manner in which it may consider the evidence presented.[16] It is not a question whether the jury

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16/ See United States v. Bussey, D.C. Cir. No. 22919, (July 21, 1970): "Moreover, no instruction was given at the time . . . [certain limited-purpose] testimony was admitted, to caution the jurors on the limited purpose for which it was being received, and it blinks reality to think that on the basis of the instruction given as part of the charge-in-chief the jury was capable of the 'mental gymnastic' of disregarding this evidence in 'any respect' except to the one purpose permitted by the trial court." (Id. at 7-8) (emphasis added). See also Delli Paoli v. United States, 352 U.S. 232, 242 (1957): "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them." There are certain situations where the evidence presented is so prejudicial that, even after "clear and explicit" instructions a jury cannot be presumed to be able to disregard it. See Bruton v. United States, 391 U.S. 123 (1968). Accordingly, when somewhat less inflammatory evidence is introduced, but the same chance of confusion exists as existed in Bruton, it is unconceivable that (cont'd on next page)

is "stupid"; rather, the court's concern should have been whether the jury would succumb to the natural tendency to apply evidence as to one co-defendant to the other, without explicit instructions that the law did not permit it to do so.

B. Denial of Defendant's Request for a Limiting Instruction was Prejudicial.

(The Court's attention is directed to the following parts of the record: None.)

In determining whether there was prejudice by reason of failure to grant an instruction,

> "[t]he decisive factors are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." Gaither v. United States, 134 U.S. App. D.C. 154, 172, 413 F.2d 1061, 1079 (1969) (footnotes omitted).

In this case, each of these standards for finding prejudice are met. The Government's case against

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(cont'd.from preceding page) without careful and clear instruction a jury can "perform the overwhelming task of considering . . . [the evidence] in determining the guilt or innocence of the . . . [actor] and then of ignoring it in determining the guilt or innocence of any co-defendants . . . ." People v. Aranda, 63 Cal. 2d 518, 529, 407 P. 2d 265, 272, cited in Bruton 391 U.S. at 131.

Mr. Sheffield was, as we have shown, supra, p. 24, "paper-thin,"[17] making it very likely that the refusal to give the limiting instruction affected the jury's decision as to Mr. Sheffield's guilt. It is also clear that the issue involved here -- the credibility of Mr. Sheffield's alibi -- was central to the case, since guilt or innocence was based on the credibility of opposing witnesses. Cf. O'Neil v. Nelson, 422 F.2d 319, 322-23 (9th Cir. 1970). Finally, no subsequent trial court conduct mitigated the prejudice caused by refusal to grant Mr. Sheffield's motion for a limiting instruction; indeed the instruction actually given offered no guidance whatsoever.

With the case in this posture, the trial court's denial of Mr. Sheffield's request that the jury be instructed not to consider the evidence rebutting co-defendant's alibi against Mr. Sheffield was prejudicial error.

17/ (See Jones v. United States, 119 U.S. App. D.C. 213, 214, 338 F.2d 553, 554 (1964)). Compare Delli Paoli v. United States, 352 U.S. 232 (1957): "[W]e start with the premise that the other evidence against petitioner was sufficient to sustain his conviction." (352 U.S. at 236); Lutwak v. United States, 344 U.S. 604 (1953): the "record fairly shrieks the guilt of the parties . . . ." (344 U.S. at 619); Nash v. United States, 54 F.2d 1006 (2nd Cir. 1932): "The guilt of the defendants is so plain that only some serious blunder in the conduct of the trial should result in a reversal." (59 F.2d at 1006).

CONCLUSION

For the reasons stated in Arguments I and II, this Court should find that the defendant was deprived of a fair trial and should reverse the verdict and judgment below and remand the case for a new pre-trial suppression hearing and if that hearing does not dispose of the matter, for a new trial.

Respectfully submitted,

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Of Counsel

December 14, 1970

APPENDIX 1

District of Columbia) ss.

AFFIDAVIT OF DONALD E. COPE

I was appointed on January 13, 1969, pursuant to the Criminal Justice Act, to represent Malvin G. Sheffield at his arraignment and served as his counsel from that point to filing notice of appeal. In connection with my representation, I appeared at the preliminary hearing in the Court of General Sessions on January 15, 1969, and cross-examined the investigating officer and Carl W. Banks, one of the Government's two identification witnesses.

On October 28, 1969, I applied for and received an authorization for the preparation of the transcript at the expense of the United States. Because I did not receive the transcript in due course, I inquired about its status at the Court Reporters Office on one, and perhaps two, occasions. I was told that the reporter was no longer employed by the Court, that she had not transcribed her notes before she left, that there appeared to be some doubt as to whether there was a pending order for the transcript.

Although I took no further steps to obtain the transcript, I do know that counsel for co-defendant, Earl H. Davis, wrote the reporter at her new address in North Carolina, to request a copy of the transcript. This

effort, likewise, did not result in our obtaining the transcript and I proceeded to pre-trial and trial without making any further efforts to obtain the preliminary hearing transcript. I should add that ordinarily I consider the preliminary hearing transcript an indispensable and necessary aid in preparing for and conducting pre-trial and trial proceedings and that it is my general practice to obtain it.

Donald E. Cope

Donald E. Cope

Sworn and subscribed to
before me this 11th
day of December, 1970.

Laurie Norris

Notary Public, D.C.

My Commission Expires Dec. 14, 1970

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of December, 1970, he did serve the foregoing "Brief for Appellant" upon the United States Attorney for the District of Columbia by causing it to be delivered to Mr. John Terry, Assistant United States Attorney, United States Court House, Washington, D.C.

Respectfully submitted,

/s/ David R. Anderson

David R. Anderson

December 14, 1970

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,330

UNITED STATES OF AMERICA, APPELLEE

v.

MALVIN G. SHEFFIELD, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney

JOHN A. TERRY,
HENRY F. GREENE,
CHARLES H. ROISTACHER,
Assistant United States Attorneys.

Cr. No. 829-69

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether an examination of the entire record in the case at bar reveals that appellant was denied the effective assistance of counsel?

2. Whether the trial court's failure to instruct the jury that the Government's rebuttal testimony pertained only to the co-defendant Randolph was reversible error when that fact was obvious to the jury?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

v.

MALVIN G. SHEFFIELD, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a fourteen-count indictment filed March 4, 1969, appellant and a co-defendant, Vincent Randolph, were each charged with two counts of armed robbery (22 D.C. Code §§ 2901 and 3202), two counts of robbery (22 D.C. Code § 2901), and eight counts of assault with a dangerous weapon (22 D.C. Code § 502). Additionally appellant was charged with possession of a sawed-off shotgun (22 D.C. Code § 3214 (a)) and Randolph with carrying a pistol without a license (22 D.C. Code § 3204). On March 23, 1970, a pretrial hearing on the propriety of certain photographic and lineup identifications was held

before the Honorable Aubrey E. Robinson, Jr. Judge Robinson ruled that these identifications were proper in all respects and that testimony about them, as well as in-court identifications, would be admissible at trial. On March 24, 1970, upon the Government's motion, Judge Robinson dismissed counts four, five, six, eight, nine, ten, eleven and twelve of the indictment.[1] On the same day trial commenced before Judge Robinson and a jury, and on March 26 appellant was found guilty of armed robbery, two counts of assault with a dangerous weapon and possession of the illegal shotgun, with no verdict being returned as to robbery.[2] On May 12, 1970, appellant was sentenced to five to twenty years' imprisonment for the armed robbery, three to nine years on each of the assault counts, and one year for possessing the sawed-off shotgun, all sentences to run concurrently. This appeal followed.[3]

The Robbery

At approximately 9:00 p.m. on December 7, 1968, Carl Banks was working behind the counter as a clerk at Seymour's Liquors, a store located at 5581 Central Avenue, S.E. Also working that evening were Mack Carter, another employee, and Henry Mates and his brother Bernard, the co-owners of the store. There were in addition four or five customers present. At this time two young men entered the establishment. The shorter of the two proceeded to the rear of the store and looked at cordials, while the taller man selected a package of potato chips from the rack and brought them to the counter. When Henry Mates approached the shorter man,

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[1] The Government moved to dismiss these counts because the complainants involved did not have a good opportunity to observe the robbers during the crime and were thus unable to identify either appellant or Randolph.

[2] The co-defendant Randolph was likewise found guilty of armed robbery, two counts of assault with a dangerous weapon, and carrying a pistol without a license.

[3] Randolph did not appeal.

looked directly at him and asked if he could be of any service, the young man replied that he was "just looking". After a few moments the taller man bought the potato chips, and both men left the liquor store. During this episode, which lasted approximately four minutes, both Banks and Henry Mates observed the faces of both men in the well-lit store, which was illuminated by fluorescent lights (Tr. I, 16-17; Tr. II, 6-7, 82-85, 91, 188).[4]

About five minutes after these men left, the undisguised and unmasked duo reappeared in the store, this time in the company of two other young men. The shorter of the two original visitors again walked past Banks and went to the rear of the store; the taller remained by the counter near the front. Suddenly the short man, whom Henry Mates again approached to wait on, pulled a sawed-off shotgun from his brown or beige raincoat and said, "Don't move; this is it, this is a stick-up; don't nobody move or I'll kill you all." (Tr. II, 9.) At this point he was ten feet from Banks. The taller youth, who was then standing on the other side of the counter but in front of Banks, drew a pistol and, with a "smart grin on his face like he was enjoying himself" (Tr. II, 35), told Banks, "Be cool, brother, and you won't get hurt" (Tr. II, 9). Brandishing the weapon, he then jumped over the counter towards Banks (who was forced to move back) and removed the contents of the cash register. The other two young men, who "were not in the picture that much" (Tr. I, 41), also drew pistols and forced the other persons present in the store to lie on the floor for the duration of the robbery.[5] Meanwhile the

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[4] "Tr. I" refers to the transcript of the hearing on the motion to suppress (March 23, 1970); "Tr. II" refers to the transcript of the trial (March 24-25, 1970), excluding opening statements, closing arguments and the trial court's instructions to the jury; "Tr. III" refers to the transcript of the opening statements, closing arguments and jury instructions (March 24 and 26, 1970); "Tr. IV" refers to the transcript of the preliminary hearing held in the Court of General Sessions (January 15, 1969).

[5] As previously mentioned, there were a few customers in the store, one of whom, Clyde Moten, was called as a defense witness.

[Footnote continued on next page]

shorter man with the sawed-off shotgun forced Henry Mates to open the safe, located in the rear of the store, from which the robber removed a box of Traveler's Express money orders. After spending approximately ten minutes in the commission of their crimes, the four left the store and disappeared into the night (Tr. I, 18-20, 27-28; Tr. II, 8-12, 85-94).

The Pretrial Identifications

On December 12, 1968, Detective Winniford Denham of the Robbery Section, Metropolitan Police, went to Seymour's Liquors and showed Carl Banks and Henry Mates a book containing approximately sixty black and white photographs of Negro males, all within the same age group.[6] Banks and Henry Mates viewed the photos separately, and, free from anyone's suggestion, both men positively identified appellant as the sawed-off shotgun-wielding shorter bandit and Randolph as his taller confederate (Tr. I, 20-21, 28-30; Tr. II, 206-207).

On January 14, 1969, Banks and Henry Mates attended a court-ordered lineup at police headquarters. Both men viewed the seven-man line separately, and again, free from anyone's suggestion, they positively identified appellant (No. 6 in the lineup, counting from left to right) as the shorter robber and Randolph (No. 2) as the taller. Both appellant and Randolph were represented by counsel at this lineup (Tr. I, 5-10, 21-22, 30-32).[7]

[Footnote continued from preceding page]

One of the robbers also took Bernard Mates' wallet from him while Mates was on the floor and, finding the wallet empty, kicked him in the head (Tr. II, 10, 190).

[6] At the pretrial hearing Mr. Banks testified that the men in the photographs were "from their teens to their twenties, or maybe a little over" (Tr. I, 20).

[7] On December 17, 1968, Banks and Henry Mates also viewed a lineup in which neither appellant nor Randolph appeared. Banks did not identify anyone. Mates said that the No. 3 man (Vincent Turner) "looked like" the shorter robber but that he "wasn't sure" (Tr. I, 13-14, 21, 30). Clyde Moten, who had been a customer in the liquor store during the robbery but did not get a good look at the robbers, was unable to identify either appellant

The trial court, after hearing testimony as to the circumstances of the photographic and lineup identifications, ruled that they did not violate due process, and he denied Randolph's motion to suppress testimony pertaining to them. The court also ruled that both Banks and Henry Mates would be permitted to identify appellant and Randolph in court (Tr. I, 43-48).

The Trial

The Case for the Government

Mr. Banks and Mr. Henry Mates testified for the Government and related the details of appellant and Randolph's visit to the liquor store just prior to the robbery, as well as the details of the holdup itself (Tr. II, 5-13, 82-94). Both Banks and Mates also told of positively identifying appellant and Randolph from photographs on December 12 and the lineup [8] on January 14, and they both made unequivocal in-court identifications of appellant and Randolph as the principal participants in the December 7 robbery (Tr. II, 7-8, 20-24, 84, 94-98). Henry Mates also testified that his liquor store is incorporated under the name of Seymour Wilen, Inc., and certificates to that affect were introduced into evidence without objection as Government's Exhibits Nos. 14 and 14 (a) (Tr. II, 80-82).

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or Randolph in a lineup conducted on July 31, 1969. Mr. Moten stated, "I didn't identify anybody, because I couldn't. I laid with my face down." Mr. Moten was so nervous at the time of the robbery that he could not even recall how long the robbers spent in the liquor store (Tr. II, 211-214).

[8] A photograph of the lineup (Government's Exhibit No. 3) was identified by Banks and Henry Mates, was introduced into evidence without objection (Tr. II, 23-24, 98), and is part of the record on appeal.

Sergeant Louis Blancato of the Robbery Section was the police officer in charge of the December 17 and January 14 lineups. Both at the pretrial hearing and at trial he testified about the positive lineup identifications made by Banks and Henry Mates on January 14, as well as Mates' saying that the No. 3 man (Vincent Turner) in the December 17 lineup "looked like" the shorter robber. See note 7, *supra*. (Tr. I, 5-10; Tr. II, 143-149.)

Leroy Thomas testified that at approximately 9:15 p.m. on December 7, 1968, he was driving on Southern Avenue towards his home, 5623 B Street, S.E., which is about one block from Seymour's Liquors. When he reached the intersection of Southern and Central Avenues, S.E., which is close to Seymour's, he observed a black convertible automobile with a white top pull sharply from the nearby curb. One of the owners of Seymour's was running behind the car, and while doing so he fired a shot at the fleeing automobile.[9] Thinking that the store had probably been robbed, Mr. Thomas followed the black and white convertible from Southern Avenue to C Street, where it made a right turn onto C and continued to the intersection of C Street and Benning Road. Before reaching this intersection, the desperado in the right front seat fired two shots at Mr. Thomas. Fortunately neither shot took effect. At this point the getaway car swerved out of control, colliding with another automobile. The occupants of the convertible quickly alighted from the vehicle, all running in different directions. Mr. Thomas was unable to describe specifically any of the fleeing men other then to say that they were Negro males. After Mr. Thomas reported what had happened to the police at Precinct No. 14, he drove by the scene of the abandoned convertible (Benning Road and C Street, S.E.), and noticed police officers on the scene examining the car (Tr. II, 134-142).

Sergeant Freeman Childers of the Metropolitan Police testified that at approximately 9:30 p.m. on December 7, 1968, while on duty in his scout car with Detective Denham, he received a radio run concerning the robbery at Seymour's and the abandoned getaway car nearby. The two officers immediately responded to Benning Road and C Street, S.E., and observed and searched the aban-

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[9] Mr. Thomas was a regular customer at the liquor store and knew the owners, Henry and Bernard Mates. The record does not disclose which of the Mates brothers fired the shot at the getaway car (Tr. II, 137).

doned black and white 1962 Oldsmobile convertible.[10] Childers found a sawed-off shotgun on the floor of the driver's side of the front seat, and on the left side of the rear seat he found a black pistol and a dark overcoat or raincoat.[11] Both of the weapons were test-fired at the police firing range and were found to be operable (Tr. II, 157-166).

Bernard Mates, co-owner of Seymour's, testified that the robbers took $715 from the cash register during the robbery.[12] While Mr. Mates was in the store during the crime, he quickly obeyed the robbers' commands to "lay down" and was unable to observe or identify any of them. Finally, Bernard Mates testified that one of the robbers kicked him in his head after finding that Mates' wallet did not contain any money (Tr. II, 181-190).

Officer Harry Schwab, assigned to the Mobile Crime Laboratory on December 7, 1968, testified that at 11:00 p.m. on that date he responded to the site of the abandoned getaway car (Benning Road and C Street, S.E.)

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[10] This vehicle was registered to George Gorham of 843 Hilltop Terrace, S.E. (Tr. II, 171-172). The co-defendant Randolph testified that he was acquainted with Gorham (Tr. II, 286). Appellant denied knowing him (Tr. II, 315). Gorham appeared in the December 17 lineup but was not identified by either Banks or Henry Mates (Tr. II, 153-156).

[11] The sawed-off shotgun (Government's Exhibit No. 6) was identified by Henry Mates as "look[ing] like" the one appellant confronted him with on December 7, 1968 (Tr. II, 99), and it was introduced into evidence (Tr. II, 199). The pistol (Government's Exhibit No. 7) and the coat (Defendant's Exhibit No. 5) were also introduced into evidence (Tr. II, 199, 333). The defense had the coat marked as an exhibit and moved it into evidence, since Randolph denied that it was his and appellant's trial counsel was permitted to demonstrate to the jury that the coat did not fit appellant (Tr. II, 300-312).

[12] This approximate amount was calculated by subtracting the amount of money that the store was left with after the robbery from the sum of money taken in that day (as revealed by the tape of the cash register) and the "bank" (cash in the register when the store opened) ($3,356 + $300 − $2,940 = $715). (Tr. II, 183-185.) The record does not reveal where the $2,940 was during the robbery or why appellant and his confederates were not able to also take this money.

and examined it for fingerprints. None of the latent fingerprints found on the left front door, left front window, right front window, rear view mirror or the pistol belonged to either appellant or Randolph. The sawed-off shotgun had apparently been wiped and did not contain any fingerprints at all (Tr. II, 190-193).

It was then stipulated that the co-defendant Randolph did not have a license to carry a pistol in the District of Columbia on December 7, 1968 (Tr. II, 195).

After the Government rested its case, appellant's and Randolph's motions for judgment of acquittal were denied following brief argument (Tr. II, 199-201).

The Case for the Defense

Appellant and his co-defendant Randolph denied committing the crimes of which the jury found them guilty. Both presented separate alibi defenses. Randolph and his mother, Margaret Randolph, testified that on December 7 he was at home (483 Burbank Street, S.E.) until approximately 7:15 p.m. attending his youngest sister's birthday party.[13] Randolph testified that he then walked to Burrell's Cleaners, which was close by (451 Chapman Street, S.E.), arriving there at 7:30 p.m. He stated that he stayed with Beverly Turner, a friend of his and an employee at Burrell's until approximately 9:00 p.m., when George Robinson, the manager of Burrell's, returned and locked the establishment for the night. Mr. Robinson, Mrs. Turner and Randolph then left Burrell's and drove in Robinson's car to Randolph's house. Mr. Robinson and Mrs. Turner waited in the car while Randolph went inside and picked up his pool cue. They then dropped Randolph off at the Coral Hills Billiard Lounge on Marlboro Pike at approximately 9:30 p.m.[14] Randolph then

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[13] Mrs. Randolph also testified that she knew that her son was acquainted with both appellant and George Gorham, the registered owner of the getaway car (Tr. II, 221-222).

[14] Mrs. Turner's testimony corroborated this part of Randolph's alibi (Tr. II, 224-230). She also stated that she knew appellant, who brought his clothes to Burrell's for cleaning (Tr. II, 233). Mr. Robinson did not testify.

played pool with a friend, Torrence Mathis, until midnight, after which the two walked to Randolph's home, arriving there at 1:00 a.m.[15] (Tr. II, 215-221, 276-301).

Appellant presented his alibi through his own testimony and that of three friends. Appellant stated that on December 7, 1968, he was living with an otherwise unidentified cousin in an apartment at 307 Anacostia Road, S.E., while he maintained a mailing address at his mother's house at 4404 Texas Avenue, S.E. At 8:20 p.m. on December 7, he testified, he walked from 307 Anacostia Road to the home of his girl friend, Doris Gils, at 101 Ridge[16] Road, S.E., arriving there at approximately 8:45 p.m.[17] At 9:30 Leroy Gils, Doris' brother and appellant's friend of eight years, and two of Mr. Gils' friends drove to a party which was being held for Lorraine Gils, the sister of Doris and Leroy, in a house at Third Street and Atlantic Avenue, S.E. They arrived there between 9:30 and 10:00 o'clock. Appellant stated that he remained at the party, at which eight or nine couples were present, until 1:00 a.m. At 1:00 o'clock appellant took Miss Gils home and stayed at her house until 5:00 a.m. before returning to his own apartment. Appellant stated that at no time on December 7, 1968, was he with his co-defendant Randolph, nor was he in Burrell's Cleaners that night[18] (Tr. II, 301-325).

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[15] Mr. Mathis, a friend of Randolph for over four years, testified and corroborated this part of the alibi (Tr. II, 237-247).

[16] Miss Gils' address is transcribed in the record as 101 Riggs Road, S.E. (Tr. II, 247). Presumably this is an error and she lived at 101 Ridge Road, because Riggs Road does not go through Southeast Washington but lies entirely in Northeast.

[17] On cross-examination appellant testified that it was only a five-minute walk from his apartment to Miss Gils' house. When confronted with his testimony on direct examination in which he stated that he arrived at Miss Gils' at 8:45 p.m. (rather than 8:25 p.m. as should have been the case), appellant for the first time stated that he stopped along the way to see Elaine Pickney, another friend, staying with her for ten or fifteen minutes (Tr. II, 321-322). Miss Pickney did not testify.

[18] Appellant testified that he often brought his clothing to Burrell's to be cleaned. In fact he was arrested for the instant offenses

Doris and Leroy Gils corroborated appellant's alibi (Tr. II, 247-265). Brenda Tidline, a friend of appellants for five years, also testified in his behalf. She stated that when she arrived at the party at approximately 11:00 p.m., appellant was already present, and that appellant and Doris Gils left the party at about 1:00 a.m. (Tr. II, 267-276).

The Government's Rebuttal

Marshall Botkin, the president of District Alarm and Signal Company, testified in rebuttal that on December 7, 1968, Burrell's Clearners had one of his company's burglar alarm systems installed inside their store. When the premises are locked for the night, a signal is transmitted by the person locking up to Mr. Botkin's main office, where it is automatically recorded. When the premises are reopened for business the following morning (or Monday morning if it is a weekend), the person opening the shop transmits another signal to District Alarm. After the cleaning shop is locked, anyone entering (even with a key) or exiting the premises would automatically trip the burglar alarm, transmitting a signal to Mr. Botkin's main office which would also be automatically recorded. Mr. Botkin's records revealed that Burrell's was locked at 8:05 p.m. on Saturday, December 7, 1968, and not reopened until 10:00 a.m. on Monday, December 9. It was thus established that, contrary to Randolph's testimony and that of his friend, Mrs. Turner, nobody entered or left Burrell's between 8:05 p.m. on December 7 and 10:00 a.m. on December 9 (Tr. II, 333-343).

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on January 11, 1969, while he was at Burrell's. On cross-examination the prosecutor asked appellant why it was that he used a cleaner located fifteen blocks from his Anacostia Road apartment. Appellant answered that he did so because "[a]t times, when I get off from work, I have dirty clothes with me. Sometimes I go straight to my mother's house, and in the process, I go across the street and put the clothes in the cleaners." (Tr. II, 329).

ARGUMENT

I. Appellant was not denied the effective assistance of counsel.

(Tr. II, 39, 44-52, 127, 153-154, 189-190, 200, 214-215, 308-312; Tr. III, 52-55, 66; Tr. IV, 28)

Solely on the basis of his trial counsel's failure to insist upon receiving and using for impeachment a transcribed copy of his preliminary hearing, appellant now claims that he was denied his constitutional right to the effective assistance of counsel at both the pretrial identification hearing and at trial. Upon a view of the entire record, we submit that appellant has failed to sustain his very heavy burden of showing that because of his counsel's ineptitude there was an absence of judicial character in the trial proceedings or that his counsel displayed gross incompetence that blotted out the essence of a substantial defense. *Scott* v. *United States*, 138 U.S. App. D.C. 339, 427 F.2d 609 (1970); *United States* v. *Hammonds*, 138 U.S. App. D.C. 166, 425 F.2d 597 (1970); *Harried* v. *United States*, 128 U.S. App. D.C. 330, 389 F.2d 281 (1967); *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958).

A. *The Pretrial Hearing*

Appellant argues that "the transcript of the preliminary hearing would have provided counsel for defendant a basis to seek to obtain exclusion of the in-court identifications, as well as the out-of-court identifications" (Brief for Appellant at 33). Specifically he argues that the preliminary hearing transcript could have been used to impeach Mr. Banks' testimony at the identification hearing concerning his ability to observe appellant at the time of the robbery, as well as demonstrating to the court that Officer Denham "coached" Banks by telling him that "the fellows that I had picked in the book [of photo-

graphs] were there [at the lineup]" (Tr. IV, 28; see Brief for Appellant at 28). In our view appellant was not denied the effective assistance of counsel at the pretrial hearing because he did not have a substantial defense to the admissibility of testimony concerning any of the identifications.

Even if Detective Denham had told Mr. Banks that appellant would be in the lineup,[19] this would not have constituted a violation of due process and therefore would not have provided grounds for excluding the lineup identification. *United States* v. (*Lester*) *Thurman*, D.C. Cir. No. 22,466, decided October 28, 1970; *cf. United States* v. *Hallman*, D.C. Cir. No. 23,800, decided January 11, 1971. A photograph of the January 14 lineup was before the court at the pretrial hearing, was introduced into evidence at trial, and is presently before this Court as part of the record on appeal, "thus providing a visual record for future reference by counsel and courts alike." *United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 92, 420 F.2d 1292, 1295 (1969); *see Patton* v. *United States*, 131 U.S. App. D.C. 197, 403 F.2d 923 (1968). The photograph discloses that the lineup consisted of seven Negro males, all of whom were approximately the same age. Counting from left to right, appellant appeared in the No. 6 position, and his co-defendant Randolph in the No. 2 position. Nos 2, 4, 5 and 6 had lighter complexions than Nos. 1 and 7. All the men were inconspicuously dressed in either shirts or pullover sweaters, save No. 7 who was dressed in a sport coat. Although appellant (No. 6) was the shortest man in the lineup by approximately two inches, this single difference certainly does not amount to a violation of due process. *Cf. Sutton* v. *United States*, —— U.S. App. D.C. ——, 434 F.2d 462 (1970). We maintain that the lineup was fair and that an examination of the photograph "leaves no room for any serious contention that the police stacked the lineup with people

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[19] At trial Mr. Banks and Detective Denham both denied that this statement was made (Tr. II, 39, 209).

whose physical characteristics were unreasonably different from appellant's." *Patton* v. *United States, supra,* 131 U.S. App. D.C. at 200, 403 F.2d at 926.[20] In other words, it cannot be said that the lineup procedures were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States,* 390 U.S. 377, 384 (1968). Given the fairness of the lineup and the photographic identification, proof as to both, as well as the in-court identification,[21] was clearly admissible at trial. Appellant therefore did not have a substantial defense for his counsel to "blot out," and his claim of ineffective assistance of counsel at the pretrial hearing must fail.[22]

B. *The Trial*

Appellant's argument that he was denied the effective assistance of counsel at trial is, under the prevailing standards mentioned above, unavailing. Because any claim of ineffective assistance of counsel must be judged by an evaluation of the entire record, an examination of trial counsel's total role in the proceedings is appropriate.

During the Government's case in chief, trial counsel cross-examined Mr. Banks and established that Banks was not facing appellant when the latter first drew the sawed-off shotgun and that Banks paid strict attention to appellant only after he drew the prohibited weapon

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[20] *Compare Patton* and the case at bar *with Foster* v. *California,* 394 U.S. 440 (1969).

[21] Much of appellant's argument is that Mr. Banks' preliminary hearing testimony would have indicated that his ability to observe appellant at the time of the robbery was inadequate to support the court's finding of independent source. However, the record clearly shows that neither the photographic identification nor the lineup violated due process; hence "there is no occasion to inquire as to independent source for the in-court identifications." *United States* v. *(Lester) Thurman, supra,* slip op. at 4 n.8.

[22] Appellant similarly argues that he was denied the effective assistance of counsel because Henry Mates' testimony at the pretrial hearing stood unimpeached. However, Mr. Mates did not testify at the preliminary hearing, and certainly he could not have been directly impeached with Mr. Banks' testimony.

(Tr. II, 44-52). This cross-examination was obviously designed to discredit Banks' ability to observe, and we submit that it was far from ineffective. During his cross-examination of Henry Mates and Sergeant Blancato, trial counsel's questions were designed to reiterate the fact that Mr. Mates suggested that Vincent Turner "looked like" the shorter robber when Mates viewed a lineup on December 17, 1968. Counsel aptly argued this posited misidentification to the jury in his summation, suggesting that "if he is mistaken once, he could very well be mistaken again" (Tr. II, 127, 153-154; Tr. III, 53). Additionally trial counsel cross-examined Bernard Mates and established that, while he was in the store during the robbery, he was unable to observe or identify any of the robbers (Tr. II, 189-190). Finally, at the conclusion of the Government's case, appellant's trial counsel made and argued a motion for judgment of acquittal (Tr. II, 200).

During the co-defendant Randolph's case, appellant's counsel's cross-examination of Mr. Moten revealed that the latter was so nervous during the robbery that he could not even estimate how long the bandits were present, let alone identify appellant (Tr. II, 214-215).

Trial counsel then presented appellant's alibi in an orderly fashion. During appellant's testimony counsel had appellant try on the raincoat (Defendant's Exhibit No. 5) found in the getaway car. By this tactic counsel was obviously attempting to demonstrate to the jury that the man pulling the sawed-off shotgun from his coat was not appellant because the coat was found immediately after the robbery, and did not fit appellant (Tr. II, 308-312). After Randolph's alibi was devastated by Mr. Botkin's rebuttal testimony, appellant's trial counsel requested that the court instruct the jury that this testimony should be considered only against Randolph. Citing cases to the court, counsel renewed and argued this request immediately prior to the charge to the jury.[23]

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[23] Appellant's trial counsel urged the court "to instruct the jury to ignore the testimony of Mr. Botkin as to Mr. Sheffield because I

Finally, appellant's counsel in his closing argument urged upon the jury the believability of appellant's alibi witnesses and the possibility that Henry Mates misidentified appellant "because if he is mistaken once, he could very well be mistaken again." He also stressed the burden of proof that the Government must meet in a criminal case (Tr. III, 52-55).[24]

We do not contend that the transcript of the preliminary hearing would not have been of value to trial counsel as a device for the attempted impeachment of Mr. Banks. We say only that we must remain cognizant of the nature of appellant's claim of ineffective assistance of counsel and the pertinent standards by which such a claim must be considered. In this regard, the entire record reveals that trial counsel's defense of appellant was far from *pro forma* and far from being "so incompetent as to deprive his client of a trial in any real sense . . . ." *Mitchell* v. *United States, supra,* 104 U.S. App. D.C. at 63; 259 F.2d at 793. Appellant has failed to carry his burden here.

II. The trial court's failure to instruct the jury that the Government's rebuttal evidence should be considered only against the co-defendant Randolph does not amount to reversible error in the circumstances of this case.

(Tr. III, 31-33, 55-56, 66-67, 78, 81, 94)

Appellant argues that because the trial court denied his request to instruct the jury that Mr. Botkin's rebuttal

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think it would be highly prejudicial if they would hear that and they might associate that with the tesitmony—in other words, they might just combine the two without thinking." (Tr. III, 66.) Interestingly, appellant's entire second argument on this appeal is that it was reversible error for the court to deny this requested instruction by his "ineffective" counsel. We submit that, absent trial counsel's effective preservation of this point, appellant would now be foreclosed from making his second argument in this Court. *See* FED. R. CRIM. P. 30.

[24] *Compare* the closing argument in the case at bar with that given in *United States* v. *Hammonds, supra,* 138 U.S. App. D.C. at 171-172, 425 F.2d at 602-603.

testimony should be considered only in respect to the co-defendant Randolph's alibi,[25] his conviction should be reversed because "the jury was free to rely on it [Mr. Botkin's testimony] as a basis for disbelieving Mr. Sheffield's testimony and alibi" (Brief for Appellant at 45). We disagree. While the giving of the requested limiting instruction would have been appropriate, the trial court's failure to do so does not amount to reversible error in this case.

In evaluating an asserted error in an omission of an instruction, we must consider the entire record to determine if the failure to give the instruction materially affected the jury's deliberations on the substantial issue in the case. *United States* v. (*Charles*) *Howard*, —— U.S. App. D.C. ——, 433 F.2d 505 (1970); *United States* v. (*Eugene*) *Thurman*, 135 U.S. App. D.C. 184, 417 F.2d 752 (1969). More specifically, we must examine *the charge as a whole*, *United States* v. *(Eugene) Thurman*, *supra*, and "[e]ven if a portion of the trial court's instructions is incorrect, an appellate court need not reverse if the error is 'cured by a subsequent charge or by a consideration of the entire charge.'" *(Thomas) Howard* v. *United States*, 128 U.S. App. D.C. 336, 340, 389 F.2d 287, 291 (1967), quoting from *Southern Pac. Co.* v. *Souza*, 179 F.2d 691, 694 (9th Cir. 1950).

An examination of the entire record clearly demonstrates that the jury was not misled by the trial court or the prosecutor into believing that Mr. Botkin's testimony could be used to demolish appellant's alibi as well as Randolph's. The trial court instructed the jury that "before you determine anything else in this case, you must determine whether the Government as to *each defendant* has proved beyond a reasonable doubt that he was one of the persons who participated in the robbery" (Tr. III, 78) (emphasis added). Specifically, in reference to each defendant's alibi the court told the jury that "[i]f,

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[25] Appellant requested JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 33 (1966) (Tr. III, 66-67).

after a full and careful consideration of all the evidence in this case, you find that the Government has failed the prove beyond a reasonable doubt that *a defendant* on trial in this case was present at the time when and the place where this liquor store robbery took place, then as to *that defendant*, again you must find him not guilty" (Tr. III, 81) (emphasis added). Finally, the court clearly instructed the jury that the cases of both appellant and Randolph were to be judged separately:

> Now, ladies and gentleman, each of these defendants is entitled by law to separate consideration in arriving at your verdict, and you should render a separate verdict with respect to each defendant. Each defendant in this case is entitled to have his guilt or innocence as to each of the crimes charged determined *from the evidence in this case that is applicable to him*, just as if he were being tried alone.
>
> Now, the guilt or the innocence of either one of the defendants in the case of any of the crimes charged should not in and of itself influence or control your verdict with respect to the other defendants. (Tr. III, 94) (emphasis added).

Thus, throughout the entire charge, the court continually reminded the jury that each defendant was entitled to separate consideration.

The closing argument of the prosecutor, contrary to appellant's suggestion,[26] treated the rebuttal testimony as applicable only to Randolph. He argued that Mr. Botkin's testimony "completely discredits the testimony of Mr. Randolph [and] of any of his witnesses because Mr. Randolph and every one of his witnesses—his mother,

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[26] Appellant somehow construes the prosecutor's closing argument as being designed to "utilize fully" the possibility that the jury was free to disbelieve his alibi solely because of the Government's rebuttal (Brief for Appellant at 46). As we point out above, the prosecutor did nothing of the kind. Instead, he argued that each alibi was unworthy of belief for separate and distinct reasons, carefully restricting his comments about the effect of Mr. Botkin's testimony to Randolph alone.

Beverly Turner, his friend in the store—they all testified that Mr. Randolph was in . . . Burrell's Cleaners . . . ." (Tr. III, 31-32). The prosecutor then, distinguishing Randolph's story, attempted to discredit appellant's alibi because of its nature (an alibi supported by relatives and friends), arguing that "Mr. Sheffield's testimony, and the testimony of his witnesses is of the more traditional kind." (Tr. III, 32-33.) Again during the prosecutor's rebuttal argument, he reiterated the difference between the two alibis and argued that they should not be believed for entirely separate reasons:

> We have seen what happens when we look at Mr. Randolph's story. Mr. Randolph's story involves a place of business, a dry cleaning establishment, and, of course, that was the fatal mistake . . . .
>
> The fatal mistake was, of course, that there was a burglar alarm system in that store on Ft. Chaplin Street which said clearly and beyond any mathematical doubt that there was nobody in that store after 8:05 that night.
>
> So that wasn't a real good alibi. But the story of being at a party and the only people there you really remember are your friends or your relatives or their relatives—that's a pretty good story, because you don't have any burglar alarm system or any mathematical evidence where you can prove beyond a certainty that someone is telling a lie. You have got to listen carefully to the testimony of the witnesses when you have that kind of alibi. (Tr. III, 55-56.)

In short, (1) appellant and Randolph had separate alibis, and by the trial testimony this fact was obvious to the jury; (2) Mr. Botkin's testimony clearly rebutted only Randolph's story, and this was also obvious to the jury; (3) the prosecutor's closing argument elaborated on these obvious points; and (4) when viewed collectively, as they must be, the trial court's instructions imparted to the jury the correct notion that they must consider the evidence for and against each defendant's alibi separately. There was thus no likelihood that the jury thought

that Mr. Botkin's testimony applied to appellant, and the trial court's failure to give the requested limiting instruction was certainly not reversible error.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 416403 504

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee	)	
	)	
v.	)	No. 24,330
	)	
MALVIN G. SHEFFIELD, JR.,	)	
	)	
Appellant	)	

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Appellant respectfully petitions for a rehearing in the above-entitled case and suggests that there be a rehearing en banc.

The panel's affirmance of Mr. Sheffield's conviction -- without the benefit of oral argument and without opinion -- serves to deprive him of a chance for a fair trial. It leaves standing a conviction based on crucial testimonial evidence that could have been decisively impeached but for appointed defense counsel's failure to procure or consider a copy of Mr. Sheffield's preliminary hearing transcript before proceeding to trial. That transcript contains material with which appointed counsel could

have challenged the admissibility of the testimony of one of the two crucial eyewitnesses to the crime -- at a pre-trial Wade-Gilbert */ hearing -- and impeached the credibility and recollection of both of these witnesses at trial.

By affirming the conviction without argument and without opinion, the decision may well be viewed as validating a course of conduct by appointed trial counsel that could have a serious effect upon the quality of such representation in the District of Columbia. Because of the grave injustice to Appellant arising from his failure to obtain a fair trial, as well as because of the serious implications of the panel's action, Appellant believes that this case is an appropriate one for rehearing or rehearing en banc.

The determination of Defendant Sheffield's guilt turned solely on the jury's belief in the accuracy of the in-court identification testimony of two eyewitnesses, Mr. Carl Banks and Mr. Henry Mates, which ran contrary to Defendant Sheffield's otherwise uncontradicted alibi. The Government had no objective evidence linking Defendant Sheffield to the robbery; there was no pursuit and arrest, no fingerprints that matched his, no weapons or stolen property found which could be traced to him. In short, there was nothing to corroborate these identifications.

*/ United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

Thus, the jury's assessment of the credibility of the eyewitness testimony was determinative. Yet, the eyewitness testimony given at trial -- some 14-1/2 months after the crime -- differed substantially from the testimony given by these witnesses at Mr. Sheffield's preliminary hearing, 13 months previously. Moreover, the testimony given at the preliminary hearing raised serious questions as to the admissibility of the testimony of at least one of the witnesses. By proceeding to the pre-trial Wade-Gilbert hearing and the trial without the preliminary hearing transcript, however, Defendant Sheffield's appointed counsel did not and could not take advantage of the opportunity and, therefore, did not provide the vital minimum of assistance necessary for a fair trial (Brief for Appellant, pp. 18-25).*/

As the record shows, the transcript could have formed the basis for counsel to:

1. Object to the admission of the identification testimony of Mr. Banks, one of the two eyewitnesses, on the grounds that the witness had been improperly coached (Brief for Appellant, pp. 12-13, 27-30);

2. Impeach Mr. Banks' testimony at the trial by use of his conflicting statements at the Preliminiary Hearing, and discredit his testimony with conflicting testimony of Mr. Bernard Mates at the Preliminary Hearing (Brief for Appellant, pp. 34-38); and

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*/ See Conley v. Dauer, 321 F.Supp. 723, 729 (W.D.Pa. 1970).

3. Discredit the testimony at trial of Mr. Henry Mates, the second eyewitness, with conflicting statements made by others at the Preliminary Hearing (Brief for Appellant, pp. 36-37).

In a case determined solely by eyewitness credibility,*/ the loss of these opportunities to discredit the Government's case was immeasurably harmful. Because defense counsel's omission tainted the entire proceeding from the Preliminary Hearing to the verdict, it was so fundamental that Defendant Sheffield was deprived of a full and fair trial (Brief for Appellant, pp. 22-23). Indeed, the Government conceded in its Brief that obtaining the preliminary hearing transcript would have been of value to Defendant's counsel as a means to impeach the testimony of the Government's witnesses and claimed only that, in the context of the appointed defense counsel's entire effort during the whole trial, the assistance of counsel was not ineffective. (Brief for Appellee, pp. 13-15.)

Clearly, the panel could not have adopted this conclusion. An adequate trial performance alone could not be sufficient if it was not supported by the most obvious and essential kind of preparation, including obtaining and reviewing the preliminary hearing transcript.

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*/ The Supreme Court has said that the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 228 (1967).

> "The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case...." Moore v. United States, 432 F.2d 730, 739 (3d Cir. 1970).

It is difficult to believe that counsel's failure to obtain the preliminary hearing transcript -- regardless of the rest of his performance -- could in these circumstances be viewed as affording Mr. Sheffield more than a "pro forma" defense. United States v. Hammonds, 138 U.S. App. D.C. 166, 173, 425 F.2d 597, 604 (1970) (Brief for Appellant, p. 24.)

At any rate, counsel's omission must be tested by a somewhat more strict "harmless error" standard than that suggested by the Goverment and, possibly, adopted by the panel. That is, in order for the panel to have concluded that counsel's assistance was effective, it must have been "able to declare a belief that [the failure to obtain the transcript] was harmless beyond a reasonable doubt," and that the judge and jury could have reached the same result if counsel had engaged in cross-examination based on the absent transcript. See Chapman v. California, 386 U.S. 18, 24 (1967). (Reply Brief for Appellant, pp. 5-6.)*/ It is hard to imagine how counsel's

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*/ This Court has recently considered and rejected the applicability of the Chapman standard to a determination of whether a case involved ineffective assistance of counsel. Mathews v. United States, D.C. Cir., No. 21, 798, at 6 (March 4, 1971), rev'd on petition for rehearing, at 2 (June 11, 1971). However, the proposal raised and rejected in Mathews was whether, once the Hammonds rule had been applied and constitutional error found, resulting from ineffective assistance of counsel, the Chapman standard should then be used, in addition, to determine whether the identified error was "harmless." Appellant here contends that the Chapman standard should have been considered in place of the Hammonds rule to determine in the first instance whether there was ineffective assistance of counsel.

failure to obtain a transcript that could have been used in the fashion described above could be harmless against this standard.

Rule 40(a) of the Federal Rules of Appellate Procedure requires that a petition for rehearing

> "state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended...."

Appellant cannot, of course, offer such a statement because the panel has issued its judgment without opinion and has given no guidance as to what matters of fact or law led to its decision. Appellant respectfully suggests that the facts involved here are sufficiently compelling and the possible implications of the decision so important to the orderly administration of justice that this case is entitled to further and fuller consideration by the Court.

Accordingly, Appellant herein petitions for rehearing and suggests a rehearing en banc.

Respectfully submitted,

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October 1, 1971

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of October, 1971, he did serve the foregoing "Petition for Rehearing and Suggestion for Rehearing En Banc" upon the United States Attorney for the District of Columbia by causing it to be delivered to Mr. John Terry, Assistant United States Attorney, Unites States Court House, Washington, D.C.

Respectfully submitted,

/s/ David R. Anderson
David R. Anderson

October 1, 1971

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,330

UNITED STATES OF AMERICA,

Appellee

v.

MALVIN G. SHEFFIELD, JR.,

Appellant

On Appeal From A Judgment Of The United States District Court For The District Of Columbia

---

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MALVIN G. SHEFFIELD, JR.,

Appellant

On Appeal From A Judgment Of The United States District Court For The District Of Columbia

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REPLY BRIEF FOR APPELLANT

I. Contrary To The Government's Contention, Defendant Sheffield Was Materially Prejudiced By The Failure Of His Trial Counsel To Obtain The Preliminary Hearing Transcript.

It is clear from an evaluation of the government's brief on the issue of effective representation that the only point remaining in serious contention between the parties is whether Mr. Sheffield was prejudiced by his attorney's

failure to obtain the preliminary hearing transcript.[1] Even as to this question, however, the government makes a significant, if cautiously constructed, partial concession:

> "We do not contend that the transcript of the preliminary hearing would not have been of value to trial counsel as a device for the attempted impeachment of Mr. Banks." Brief for Appellee, p. 15.

By itself, effective impeachment of Mr. Banks at trial could have made a crucial, indeed decisive, difference in the posture of the case as it went to the jury since Mr. Banks' eyewitness testimony was a major element in the case.[2] On that basis alone, a new trial should be required.[3] Moreover, the government never comes to grips with the other specific manifestations of prejudice to Mr. Sheffield's defense that stemmed from his counsel's failure to obtain and employ the preliminary hearing transcript. The transcript could have been used, at either the pre-trial Wade and Gilbert[4] hearing, the trial itself, or both:

1/ Defendant Sheffield has argued, and the government has not disputed, that he was entitled to the transcript as part of the constitutionally protected right to a preliminary hearing; that trial counsel could and should have obtained the transcript as part of the vital minimum of investigation and preparation required of his representation; and that failure to obtain the transcript could not be justified on "trial tactics" grounds.

2/ See the discussion of Mr. Banks' testimony below at p. 3.

3/ See the discussion of the harmless error point below at p. 5.

4/ United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967).

1. To object to the admission at trial of Mr. Banks' lineup identification of defendant Sheffield on the ground that he had been coached by Officer Denham that "the fellows" Banks had identified from photographs would be in the lineup (Prelim. H'g Tr., p. 28); and to challenge, at both the pre-trial hearing and the trial itself, Mr. Banks' claim that he had a clear opportunity to observe the shorter holdup man. At the preliminary hearing fourteen months earlier when the facts were presumably still clear in his mind, Banks had testified that he had been forced to "lay on the floor so quick, you couldn't hardly see."[5/] and had described the shorter holdup man as "a little short fellow,"[6/] "five feet" tall.[7/] Since this description does not match Mr. Sheffield, the judge might well have doubted Banks' claim that he was able to observe the holdup man and ruled both his out-of-court and in-court identifications inadmissible. Even if the trial court had permitted Banks' identification testimony to be offered, the transcript would still have been, as the government conceded, a valuable tool for impeaching Banks at trial.

5/ Prelim. H'g Tr., p. 26.

6/ Id. at 22.

7/ Id. at 24.

2. To challenge Henry Mates' testimony at pre-trial and, if necessary, at trial, to the effect that he had an adequate opportunity to observe the man he selected as the shorter of the holdup men because he waited on them. On this point, Banks' preliminary hearing testimony indicates that it was one of the clerks, not one of the owners, who waited on the shorter man. (Prelim. H'g Tr., p. 24) Moreover, the transcript, which contains Banks' firm description of the shorter man as "five feet" tall, could have been used to discredit Henry Mates' selection of the much taller Sheffield as the robber.

3. To confront Bernard Mates -- who testified at trial that he couldn't see or identify Sheffield -- with the policeman's preliminary hearing testimony on cross-examination that Bernard Mates had identified Sheffield from photographs during the field investigation (Prelim. H'g Tr., p. 13), and, also, with Banks' preliminary hearing testimony that Bernard Mates apparently had an opportunity to observe the shorter of the holdup men. (Prelim. H'g Tr., pp. 23-25) Obviously, if Bernard Mates had seen the holdup men clearly and did not agree that Sheffield was one of them, the government's identification case would have been seriously impaired, if not totally discredited.

Despite the obvious magnitude of those lost opportunities and their effect upon Mr. Sheffield's defense, the government contends that, as a matter of law, the trial court was required to rule that the photographic and lineup identifications of Sheffield made by Banks and Henry Mates were admissible, and that the in-court identifications by both were also admissible. In addition, the government contends that counsel's conduct of other aspects of the case purged the proceeding of the prejudice to his client resulting from the failure to obtain and employ the transcript.

Before these contentions are reached, it should be pointed out that the prejudice stemming from the failure to obtain the transcript requires reversal unless this Court "is able to declare a belief that it was harmless beyond a reasonable doubt" and that the trial court would have reached the same result if it had all the evidence before it.[8/] In a case where the preliminary hearing was not reported, this Court recently held that the failure should not be considered harmless if the defendant presented a "colorable claim of prejudice."[9/] Here, the claim of prejudice is not merely

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8/ Chapman v. California, 386 U.S. 18, 24 (1967); accord, Kotteakos v. United States, 328 U.S. 750, 765 (1945); Gaither v. United States, 134 U.S. App. D.C. 154, 172, 413 F.2d 1061, 1079 (1969) (closeness of the case, centrality of the issue, and steps taken to mitigate are the decisive factors).

9/ Gardner v. United States, 132 U.S. App. D.C. 331, 333, 407 F.2d 1266, 1268, cert. denied, 395 U.S. 911 (1969).

"colorable," it is substantial and systemic -- affecting the entire course of the pre-trial and trial.

As to the first of the government's three contentions -- that the lineup identifications were admissible as a matter of law -- the cases it cites involving pre-lineup coaching and fairness simply do not reach the facts here. The closest case is United States v. (Lester) Thurman.[10/] There, neither the policeman who asked the victim to view the lineup, nor any other officer, made a statement that could be construed as direct coaching. Here, by contrast, the policeman told the witness that the "suspects [he] had picked in the book" would be in the lineup.[11/] Moreover, the court in Thurman held that "all other aspects of the lineup . . . tended to preserve its objectivity."[12/] Here, in a case where the witness had his mind fixed on a short person, the objectivity of the lineup was destroyed by the fact that Sheffield was clearly the shortest person in the lineup by some three inches.[13/]

The government's second contention -- that the in-court identifications were admissible as a matter of law -- is based

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10/ D.C. Cir. #22,466 (Oct. 28, 1970).

11/ Prelim. H'g Tr., p. 28.

12/ United States v. (Lester) Thurman, supra, note 10, slip opinion, at p. 9.

13/ The government puts the difference at two inches. The picture of the lineup is part of the record on appeal and it can speak for itself. It shows that Mr. Sheffield was materially shorter than any other person in the lineup.

on an unfounded conclusion. If, with all the facts before it, the trial court has prohibited the admission of the lineup identifications, it could have permitted witnesses to make in-court identifications only if there was an adequate independent basis for such identifications. Wade and Gilbert, supra, note 4.[14/] Because it found the lineups unflawed, however, the court never reached this question.

As to its "entire record" contentions, the government cites no case which supports the proposition that a critical and admittedly prejudicial failure in preparation or investigation can be overcome by counsel's adequate discharge of other aspects of the case. The critical flaw in the government's "entire record" position is that an "entire" record was never made. The heart of the defense on the most crucial issue was never developed. Counsel at trial did not and necessarily

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14/ The photographic identifications made by Banks, Henry Mates and, apparently, by Bernard Mates do not constitute any such independent basis. Because the trial court was unaware of the flaws in the lineup identifications, it never dealt with the question whether the lineups obliterated the value of the photographic identifications. Moreover, considerable confusion about the photographic identifications was raised at the preliminary hearing, but, because that transcript was unavailable at the Wade and Gilbert hearing, there was no way to challenge them at that hearing. A key point on which there is considerable confusion is whether Bernard Mates made a photographic identification, as Officer Denham seems to have indicated (Prelim. H'g Tr., p. 13). Since Bernard Mates later denied the ability to make any identification, the officer's conflicting testimony may indicate that the photographic identification was somehow improper, e.g., that Mates for some reason made an identification that he later felt he could not sustain.

could not conduct any cross-examination of any witnesses based on the missing transcript. Nor could he make any argument to the jury based on it or use it to support objections. In effect, then, the government is asking this Court to approve the performance of an actor who played only half his lines on the grounds that those lines were adequately discharged.

In sum, defendant Sheffield was entitled to a trial at which the results of his attorney's efforts to obtain and employ the preliminary hearing transcript inured to his benefit. No amount of evaluation of other aspects of the record can replace the opportunities of which he was deprived. See Johnson v. United States, 71 App. D.C. 400, 110 F.2d 562 (1940) (case remanded for new trial where counsel failed to obtain transcript of coroner's inquest).

II. Even Using The Standards Set Forth In The Brief For The Government, The Trial Court's Failure To Instruct The Jury That The Government's Rebuttal Evidence Should Be Considered Only Against The Co-Defendant Was Prejudicial Error.

The government admits that a limiting instruction warning the jury to consider the prosecution's rebuttal evidence solely against Mr. Sheffield's co-defendant, as requested by Mr. Sheffield's counsel at the trial, "would have been appropriate . . . ." (Brief for Appellee, p. 16.) Nevertheless, the government urges that, in order to evaluate

the harmfulness of the error caused by the omission of the instruction, "we must consider the entire record to determine if the failure to give the instruction materially affected the jury's deliberations on the substantial issue in the case." Id. Yet, review of the entire record (rather than the limited portions the government considers) demonstrates that the requested instruction was essential, and that the trial court's failure to give it was prejudicial error.

Mr. Sheffield offered an alibi establishing that he could not have taken part in the crime. It was based on the uncontradicted testimony of Mr. Sheffield and other defense witnesses. The government was unable to rebut Mr. Sheffield's alibi evidence directly. However, it made substantial efforts to link the veracity of Mr. Sheffield's alibi with that of co-defendant Randolph -- which the government had been able to disprove. Indeed, the government's closing argument sought to leave the jury with the conclusion that, if Mr. Randolph's alibi was false, the jury should, for that reason alone, disbelieve Mr. Sheffield's alibi (see Brief for Appellant, p. 46). Absent the instructions requested by Mr. Sheffield's counsel, the jury was left the latitude to follow this clearly improper suggestion.

Thus, in the light of the "entire record," it is clear that the court's failure to give the instruction "materially affected the jury's deliberations on the substantial issue in

the case." (Brief for Appellee, p. 16.)[15/] Accordingly, refusal by the trial court to grant the admittedly "appropriate" instruction requested by defendant Sheffield was prejudicial error.

CONCLUSION

For the reasons stated above, as well as those stated in appellant's initial brief, this Court should find that the defendant was deprived of a fair trial and should reverse the verdict and judgment below and remand the case for a new pre-trial suppression hearing and a new trial.

Respectfully submitted,

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March 1, 1970

15/ Cases cited by the government do not lead to a contrary result. In United States v. (Charles) Howard, ___ U.S. App. D.C. ___, 433 F.2d 505 (1970), the portions of the charge challenged on appeal had not been specifically objected to below. In United States v. (Eugene) Thurman, 135 U.S. App. D.C. 184, 417 F.2d 752 (1969), cert. denied, 397 U.S. 1026 (1970), the instructions challenged on appeal had not been objected to below and in fact, had been specifically requested by defendant's trial counsel. Finally, in (Thomas) Howard v. United States, 128 U.S. App. D.C. 336, 389 F.2d 287 (1967), no proper objections were made to the instruction; the only objection on appeal was that the instruction was "too brief." Moreover, the error was corrected by a later instruction.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of March, 1971, he did serve the foregoing "Reply Brief for Appellant" upon the United States Attorney for the District of Columbia by causing it to be delivered to Mr. John Terry, Assistant United States Attorney, United States Court House, Washington, D.C.

Respectfully submitted,

/s/ David R. Anderson

David R. Anderson

March 1, 1971